LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 13 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 837

MONIQUE VON CLEEF, and JAMES ALBERT BEARD,

Petitioners,

vs.

STATE OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY

HERALD PRICE FAHRINGER
One Niagara Square
Buffalo, New York 14202

WILLIAM JOHN KEARNS, JR.
180 West State Street
Trenton, New Jersey 08608

Counsel for Petitioners

December , 1968

Washington, D. C. · THIEL PRESS · 202 · 393-0625

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
The Search	6
The Search of Petitioner's Office	6
The Search of the Storage Room	7
The Motion to Suppress	9
The Trial	9
The Appeal to the Appellate Division	10
Reasons for Granting the Writ	12
1. The warrantless search of the Petitioner's sixteen room house by the police and the seizure of virtually all of her private records, books and papers, violated her rights under the Fourth and Fifth Amendments to our Federal Constitution because: (1) It was not incidental to petitioner's arrest in that the search and seizure went far beyond her person and the things under her immediate control, and (2) it was a general exploratory search, and (3) it involved primarily the seizure of petitioner's private papers, and (4) There was no probable cause for petitioner's arrest	12
2. An act of punishment when committed by two consenting adults, in private, cannot constitutionally be rendered criminal	17
3. Under recently established constitutional standards Spankers Monthly is not obscene	19
4. None of the foregoing issues have been rendered moot by the service of the petitioner's sentence	20
Conclusion	21

Appendix A (Opinion of Appellate Division, Superior Court, State of New Jersey) A.1

Appendix B (Opinion of Essex County Court) B.1

Appendix C (Order denying Certification to Supreme Court of New Jersey) C.1

CASE CITATIONS

Beck v. Ohio, 379 U.S. 89 (1964) 17

Carafas v. LaVallee, 391 U.S. 234 (1968) 20

Friedman v. New York, 388 U.S. 441 (1967) 10, 19

Ginsberg v. New York, 390 U.S. 629 (1968) 20

Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) . . . 15

Gouled v. United States, 255 U.S. 298 (1920) 15

Griswold v. Connecticut, 381 U.S. 479 (1965) 18, 19

In re Harris, 16 Cal. 2d 889, 366 P.2d 305 (Sup. Ct. 1961) 20

Kremen v. United States, 353 U.S. 346 (1957) 12, 13, 15

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 19

Marron v. United States, 275 U.S. 192 (1927) 15

Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967) 16

Preston v. United States, 376 U.S. 364 (1964) 12, 15

Schoudel v. State, 57 N.J.L. 209, 30 A. 598 (Sup. Ct. 1894) 18

Sibron v. New York, 392 U.S. 40 (1968) 20

Smith v. California, 361 U.S. 147 (1959) 2

Stanford v. Texas, 379 U.S. 476 (1964) 13, 15

State v. Brenner, 132 N.J.L. 607, 41 A.2d 532 (E & A 1945) . . . 18

State v. Burnett, 42 N.J. 377 (1964) 17

State v. Von Cleef, 245 A.2d 495 (1968) 14

State v. White, 129 N.J.L. 200, 28 A.2d 774 (Sup. Ct. 1942), *aff'd* on opinion below, 130 N.J.L. 527, 33 A.2d 815 (E & A 1943) 18

United States v. Lefkowitz, 285 U.S. 452 (1932) 15, 16

United States v. Rabinowitz, 339 U.S. 56 (1950) 11, 13, 14

Yudkin v. State, 299 Md. 233, 182 A.2d 798 (Ct. App. 1962) 20

STATUTORY PROVISIONS

N.J.S. §2A:98-1 . . . . . 2, 3
N.J.S. §2A:115-1 . . . . . 2, 3, 17, 18, 19
N.J.S. §2A:115-2 . . . . . 2, 4
N.J.S. § 2A:133-2b 2, 4
Model Penal Code, § 213.2 (1962) 18
Title 8, U.S.C. § 241(a)(4) 20

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment IV 3, 12, 13
Constitution of the United States, Amendment XIV, § 1 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No.

MONIQUE VON CLEEF, and JAMES ALBERT BEARD,

Petitioners,

vs.

STATE OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY

Petitioners, Monique Von Cleef and James Albert Beard, pray that a Writ of Certiorari issue to review the judgments of the Appellate Division of the Superior Court of New Jersey rendered in these proceedings on July 2, 1968.

OPINIONS BELOW

The opinion of the Appellate Division, reported at 102 N.J. Super. 102, 245 A.2d 495 (1968), appears at Appendix A, *infra*, pp. A.1-22.

The opinion of the Essex County Court, is unreported, and appears at Appendix B, *infra*, pp. B.1-8. A petition for certification to the Supreme Court of New Jersey was

denied on September 17, 1968, without opinion. A copy of that order appears at Appendix C, *infra*, pp. C.1.

JURISDICTION

Petitioners were found guilty of conspiracy to maintain a building for the purposes of soliciting lewdness and to commit acts of lewdness with others in private (2A:98-1; 2A:115-1; 2A:133-2)[1]; permitting a building to be used for the purpose of lewdness (2A:133-2b); and possessing, with intent to utter, obscene books (2A:115-2).

Petitioner, Von Cleef, was sentenced to a term of 18 months in the Essex County Penitentiary, 4 months to be served in custody and the balance on probation, and was fined $1,000.00. An application for a stay of petitioner Von Cleef's sentence was denied and therefore service of her sentence was completed on November 10, 1968. She is still serving the balance of her sentence on probation.

Petitioner Beard was fined $500.00 and placed on probation for a period of 18 months.

On July 2, 1968 the Appellate Division of the Superior Court of the State of New Jersey affirmed the petitioners' convictions. On September 17, 1968 the Supreme Court of New Jersey denied a petition for certification. This petition for Writ of Certiorari is filed within 90 days following that denial.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether petitioners' convictions under New Jersey Penal provisions, predicated upon evidence seized from petitioners' home, without a search warrant or valid arrest warrant, in a general, exploratory search, can be sustained under the Fourth and Fourteenth Amendments of the United States Constitution?

---

[1] Sections of Title 2A, Administration of Civil and Criminal Justice, New Jersey Statutes Annotated.

2. Whether an act of punishment committed between two consenting adults, in private, can be made criminal under the Due Process Clause of the Fourteenth Amendment?

3. Whether the state court's determination that *Spankers Monthly* was obscene may be sustained under any definition of obscenity permitted by the First Amendment to the United States Constitution?

4. Whether petitioners' convictions can be sustained under the Due Process Clause of the Fourteenth Amendment where the defense is precluded from offering in evidence other publications previously found to be not obscene by this Court?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution of the United States, Amendment IV:

> The right of the People to be secure . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment XIV, § 1:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

New Jersey Statutes:

§ 2A:98-1. *Conspiracy* – Provides in part:

> Any 2 or more persons who ~~con~~spire:
>
> a. To commit a crime; . . . .
>
> are guilty of a conspiracy . . . .

§ 2A:115-1. *Lewdness or Indecency* – Provides in part:

> Any person who commits open lewdness or a notorious act, of public indecency, grossly scandalous and tending to debauch the morals and manners of

the people, or in private commits an act of lewdness or carnal indecency with another, grossly scandalous and tending to debauch the morals and manners of the people, is guilty of a misdemeanor.

§2A:115-2. *Uttering or Exposing Obscene Literature or Pictures* – Provides in part:

Any person who, without just cause, utters or exposes to the view or hearing of another, or possesses with an intent to utter . . . any obscene or indecent book . . . is guilty of a misdemeanor.

§2A:133-2b. *Soliciting, Procuring or Engaging in Prostitution: Keeping, Occupying or Permitting Use of Place for Prostitution* – Provides in part:

Any person who:

b. Occupies any place, structure, building, . . . for the purpose of prostitution, lewdness or assignation, or permits any place, structure, building, vehicle or conveyance owned or controlled by him to be used for such purpose, with knowledge or reasonable cause to know that the same is, or is to be, used for such purpose . . . is guilty of a misdemeanor.

STATEMENT OF THE CASE

In October of 1963, the Essex County Sheriff's office, in conjunction with the postal authorities, launched an investigation into the publication and distribution of two magazines entitled *Flair* and *LaPlume* which contained articles on sado-masochism and ads for sex clubs. (19a, 20a).[2] The Flair Club, an organization composed of people who shared a mutual interest in sadism and sado-masochism, was also the subject of this investigation. The magazines *Flair* and *LaPlume* were traced to 850 Lake Street, Newark, New Jersey, the residence of the petitioners Monique Von Cleef

---

[2]Refers to the appendix in the Appellate Division of the Superior Court of New Jersey, filed in this Court.

and James Albert Beard.[3] In the meantime the postal authorities intercepted a letter addressed to Theodore Sullivan which was signed "Superior Monique", giving a telephone number located at the Lake Street Address. Arthur Magnusson, a detective in the Essex County Sheriff's office, posing as a person interested in sadistic behavior, called the petitioner and arranged to meet her the next day at her home in Newark. (T.2.68, 2.70) His conversation with the petitioner left uncertain what would happen to him the next day, except that he was to receive about one hour and one-half of "training" for a fee of $50.00. (T.2.69, 2.70).[4]

The following day a raiding party, consisting of Magnusson and other police officers, armed with arrest warrants, but no search warrant, was mobilized. (T.2.70) The plan was that Magnusson would enter the home at the appointed time and the police strike force would enter exactly one-half hour later. (T.2.70)

Magnusson entered the home and was shown to the third floor by the petitioner Beard, where he met the petitioner and was given a copy of *Spankers Monthly*, a magazine containing articles on the art of "spanking". (9a) Magnusson and the petitioner discussed various aspects of "discipline" for a while, and then he tried, unsuccessfully, to persuade the petitioner to have normal sexual relations with him. (12a) However, the petitioner did agree to whip Detective Magnusson. (12a) He then removed his shoes and stripped down to the waist; while petitioner left the room to change her clothes. (12a)

Just as the petitioner returned dressed in a black rubber suit, similar to a bathing suit, the police raiding party burst into the house and occupied the premises. Magnusson displayed his arrest warrant to the petitioner and placed her under arrest. (13a, 17a)

---

[3]Monique Von Cleef will be referred to as the petitioner and James Albert Beard will be referred to as the petitioner Beard.

[4]Refers to trial transcript.

Prior to the petitioner's arrest there were no lewd acts committed; no obscene comments or gestures made; nor any exchange of money. (66a, 67a) All that had actually happened was the petitioner and Magnusson had talked about his being punished. (66a, 67a)

THE SEARCH

The petitioner was arrested in a small bedroom on the third floor of her colonial-type house which consisted of sixteen rooms. (7a)

The ground floor was made up of two large rooms. (41a, 42a)

The second floor consisted of six rooms, including an office, storage room, bathroom, kitchen, the petitioner's bedroom and the petitioner Beard's bedroom. (46a, 47a)

The third floor had eight rooms, including a sitting room, three bedrooms, a kitchenette, a bathroom, a small room containing a cot and a room called the "tower". (43a, 44a)

After the initial entry of the police force, reinforcements were summoned and eventually some 30 police officers swarmed over the petitioner's premises. (52a, T.3.305, T.3.307) Although the arrest was actually made in one small room on the third floor, *every room* in the house was extensively searched. (41a, 42a)

Nothing of any evidentiary value was taken from the room on the third floor in which the petitioner was arrested except the magazine *Spankers Monthly*. Practically all of the incriminating evidence was seized from the rooms on the second floor of the petitioner's home.

THE SEARCH OF PETITIONER'S OFFICE

Postal Inspector Kallies, who was a member of the original raiding party, proceeded directly to the second floor and searched the petitioner's office. (34a, 35a) After three and one-half hours of ripping open petitioner's private files, desk drawers and filing cabinets, the *entire contents* of the petitioner's office was confiscated. (34a, 40a, 41a) The

following is an inventory of the property seized from petitioner's office:

(1) 4,500 pieces of personal correspondence (16a, 36a);

(2) two filing cabinets and a file drawer containing approximately 2,000 individuals' names and addresses (60a);

(3) approximately 200 boxes containing issues of *Flair* magazine (40a, 41a);

(4) a cigar box containing 200 applications for membership in the Flair Club (62a);

(5) a mailing list of over 20,000 names (16a, 17a; 59a, 62a);

(6) 20 catalogs listing items for sale in the Flair publication (63a);

(7) 9 manila envelopes containing pictures of members of the Flair Club and a directory of its members (58a);

(8) a check book for Flair Enterprises (58a);

(9) all photographs, negatives, drawings, illustrations and other paraphernalia used in the publication of Flair (62a);

(10) 18 photographs of the petitioner in various poses with other males and females (never claimed by the state to be obscene) (61a);

(11) a large quantity of photographs of the petitioner (61a, 62a);

(12) 200 photographs with accompanying stories (63a),

(13) a role of 8 mm film (62a).

THE SEARCH OF THE STORAGE ROOM

The petitioner's storage room, also located on the second floor, was ransacked by Detectives Magnusson; Gearty, Muller and Inspector Kallies (51a). As was true of the office, the entire contents of this room were taken away by the police. The following property was seized:

(1) 7 cartons of *unopened* mail (58a);

(2) a large number of forms, blank invoices and catalogs for *Flair* publications (16a, T.2.132);

(3) a large quantity of correspondence addressed to petitioner (64a);

(4) a "pile" of correspondence addressed to persons with code number C-154 and C-174 (64a, 65a);

(5) a series of 13 letters addressed to the petitioner (65a);

(6) 15 pastel drawings (17a, 58a).

Every room in petitioner's home was searched and any item found to be of any interest to the police was seized. (36a)

Removed from one of the rooms on the third floor was a large quantity of red rubber garments and various types of belts and other restraining devices, together with two photo albums containing pictures of the petitioner found in a dresser drawer. (55a, 56a)

From another small room on the third floor was removed a pair of rubber boots, a female southwester made of rubber material, a black cape, a leather cape, a black belt, a leather corset, a rubber hat, a rubber skirt and other rubber garments. (55a)

Taken from the room referred to as the "tower" was a set of handcuffs attached to lengths of chain which were fastened to the ceiling. (38a, 39a)

A large quantity of material was seized whose original location was never designated. This material included a large quantity of petitioner's books on sado-masochism taken from her private collection of these materials. (T.2.134, 56a, 57a, 60a, 61a)[5]

---

[5]Detective Magnusson presided over the search. From headquarters set up in the second floor room, he directed his men to bring each item to him to determine whether it should be seized. (16a)

By the end of the day, after the police finished stripping the petitioner's home, over 29,000[6] of the petitioner's books, letters, private papers, records, file cards and garments had been packed up and hauled away, requiring two trips by the police van.

THE MOTION TO SUPPRESS

The petitioner asserted her Federal Fourth Amendment constitutional claims, in advance of trial, in a motion to suppress the evidence seized by the police. (23a) In that proceeding the arrest warrants were invalidated because the trial court found they were unsupported by any probable cause. (23a, 24a) However, this broad search and seizure was sustained on the grounds that a crime had been committed in the presence of Detective Magnusson when the petitioner gave him a copy of *Spankers Monthly*, found by the court to be obscene. (24a, 25a) The Court then determined that this voluminous seizure of all of the petitioner's private papers and personal effects was incident to her arrest. Accordingly, almost all the items seized by the police were received in evidence and contributed substantially to the petitioners' convictions.

THE TRIAL

There was no direct proof that the petitioners ever committed any lewd acts with anyone. Instead, the state relied exclusively on the circumstantial evidence seized from the petitioner's home. The prosecution offered in evidence almost all of the materials seized from the petitioner's home and the state's expert, Dr. Jack Chernus, testified that these objects could be used by persons engaged in sadistic and sado-masochistic behavior. (T.2.126 - 2.135)

A large quantity of books and magazines seized from the petitioner's private library was offered under Count four of the indictment, charging the possession of obscene books with an intent to utter, without any evidence of uttering or an intent to utter. (56a, 57a, 60a, 61a)

---

[6]Computed from the figures given in the trial record.

Among the seven cartons of mail seized from the storage room on the second floor, certain letters were selected which were purportedly written by other persons to the petitioner and were read to the jury in their entirety without any showing of exemption from the hearsay rule. (T.3.221)

Defense counsel offered in evidence, for comparison purposes, a number of books and pictures, similar to *Spankers Monthly* which were held not obscene by this Court in *Friedman v. New York*, 388 U.S. 441 (1967). The trial court excluded this evidence. (T.3.7 - 3.12, 4.70, 4.101, 4.102)

Dr. Frank S. Caprio testified for the defense that acts of sado-masochism are not lewd but rather are the result of a personality disorder. (T.3.94)

Neither petitioner testified.

The jury found both petitioners guilty on June 23, 1967.

THE APPEAL TO APPELLATE DIVISION

Following their convictions in the Essex County Court, the petitioners appealed to the Appellate Division of the Superior Court of New Jersey, where they raised the same Federal constitutional claims urged here. The Appellate Division sustained this enormous seizure of evidence on a new theory, first introduced into this case in that Court. They held there was probable cause for arresting the petitioners because they were occupying the premises for the purposes of lewdness.[7] The Court found that ". . . it was

[7]This finding is inconsistent with the trial court's determination that: "Even if the complaints had contained all facts known to the officer, the warrant would still be defective for the reason that the available intelligence did not constitute such probable cause as to give rise to the belief that an offense had been committed. When the warrants were sought, Magnusson was aware of the defendant's unusual and curious, but nevertheless vague advertisement in 'LaPlume'; her short and non-incriminatory note to Ted Sullivan and her non-commital telephone conversation. On the basis of these facts it is difficult to find that a crime had been committed." (Appendix B, pp. B.4-5)

almost certain that a criminal act would have been completed had the pre arranged raid not interrupted the activities" and thus the Court sustained this vast seizure as incidental to the petitioners' arrest, relying upon *United States v. Rabinowitz*, 339 U.S. 56 (1950). (Appendix A, pp. 11-12)

The New Jersey Appellate Court held that criminal sanctions could be imposed upon those engaged in consensual acts of punishment even though conducted in private. (Appendix A, pp. 13-15)

The Court found *Spankers Monthly* to be obscene and rejected the petitioners' contention that comparison magazines, held by this Court not to be obscene, were erroneously excluded from the trial.

Following the affirmance of the petitioners' convictions in the Appellate Division, these contentions were renewed in a petition for certification to the Supreme Court of New Jersey which was denied on September 17, 1968.

REASONS FOR GRANTING THE WRIT

1. The Warrantless Search of the Petitioner's Sixteen Room House by the Police and the Seizure of Virtually All of Her Private Records, Books and Papers, Violated Her Rights Under the Fourth and Fifth Amendments to Our Federal Constitution Because:

(1) It Was Not Incidental to Petitioner's Arrest in That the Search and Seizure Went Far Beyond Her Person and the Things Under Her Immediate Control, and

(2) It Was a General Exploratory Search, and

(3) It Involved Primarily the Seizure of Petitioner's Private Papers, and

(4) There Was No Probable Cause for Petitioner's Arrest.

(1) The Search Was Not Incidental to Petitioner's Arrest.

A number of significant questions involving the law of search and seizure loom large in the wake of the judgment below. Since the scope of the search presents the most serious violation of the Fourth Amendment, it will be discussed first.

Assuming, without for a moment conceding, that the petitioner was validly arrested, the wholesale seizure of all petitioner's private papers from her home far exceeded the permissible bounds of a search incidental to an arrest fixed by this Court.

Historically, searches incidental to an arrest have only been sustained in a narrow class of cases. Under emergency circumstances they are sometimes allowed to protect an arresting officer from the hidden dangers of concealed weapons, or to prevent the destruction of evidence. *Preston v. United States,* 376 U.S. 364 (1964). In this case, neither of these fears was justified and thus a search incident to the petitioner's arrest was completely unauthorized.

Directly dispositive of the question at bar is *Kremen v. United States,* 353 U.S. 346 (1957) where F.B.I. agents

searched a cabin in which the defendants were harboring certain fugitives from justice. As in our case the agents confiscated the entire contents of the cabin, claiming the seizure was incidental to the defendants' arrest. This Court in *Kremen*, held in unmistakable language that:

> The seizure of the entire contents of the house and its removal some 200 miles away to the F.B.I. offices for the purpose of examination are beyond the sanction of any of our cases. 353 U.S. at p. 347.

The petitioner's claim of Fourth Amendment violations is clearly controlled by *Kremen* and thus should compel the granting of this petition.

Stanford v. Texas, 379 U.S. 476 (1964) is also remarkably similar to the case at bar, for there the Texas police, armed with a general search warrant, seized fourteen cartons of John Stanford's books, personal correspondence, bills and receipts used in his business, claimed to be connected with the Communist Party of Texas. As in our case, most of the property seized consisted of literary material.

This Court, acting under the leadership of Mr. Justice Stewart, held:

> . . . the Fourth and Fourteenth Amendments guarantee to John Stanford that no official of the State shall ransack his home and seize his books and papers under the unbridled authority of a general warrant. . . . 379 U.S. at p. 486.

Surely the Court's language in *Stanford* is all the more applicable to the monstrous search and seizure conducted here, which was warrantless, but was conducted under the pathetic pretense that it was incidental to the petitioner's arrest.

The New Jersey Court's reliance upon *United States v. Rabinowitz*, 339 U.S. 56 (1950) in sustaining this massive seizure is misplaced. In *Rabinowitz* this Court sustained a very limited search, as incidental to an arrest, only because:

> . . . (1) the search and seizure were incident to a valid arrest; (2) the place of the search was a business room to which the public, including the officers, was invited; (3) the room was small and under the immediate and complete control of respondent; (4) the search did not extend beyond the room used for unlawful purposes; (5) the possession of the forged and altered stamps was a crime, just as it is a crime to possess burglars' tools, lottery tickets or counterfeit money. 339 U.S. at p. 64.

Our case bears no resemblence to *Rabinowitz* because (1) the search was not incident to a valid arrest; (2) the place of the search was a private home to which the general public was not invited; (3) the search was of an entire house involving three floors and 16 rooms, instead of one small business office; (4) the search did extend far beyond the room in which the petitioner was arrested and (5) the possession of the petitioner's letters, records and magazines involved no criminal conduct and the property seized was not contraband.[8]

Significantly, the trial court was unable to locate any precedent holding that sado-masochistic behavior is criminal, where unaccompanied by other recognized criminal conduct such as rape or indecent exposure. (24a)

In the case at bar, virtually all of the evidence seized by the police was concealed from open view, having been stored in dresser drawers, file cabinets or closed boxes. Surely, this indiscriminate and warrantless pillaging of the petitioner's home bristles with all of the evils of a general

---

[8]Although the New Jersey Appellate Court held that: ". . . the items searched for and seized related to the criminal operation for which the arrest had been made." *State v. VonCleef*, 245 A.2d at p. 501, the petitioners were never charged with any crime concerning the publication of the magazines *Flair* or *LaPlume*. The state never claimed that either of these publications was obscene or that their distribution constituted a crime. Thus the Appellate Division's declaration that all the literary items seized were related to a criminal operation is totally unwarranted.

warrant so roundly condemned by this Court in both the *Kremen* and *Stanford* cases and, thus, requires the granting of this writ.

(2) The Search Was Exploratory.

The New Jersey Courts apparently failed to consider that the right to conduct a search incidental to an arrest, does not include the right to conduct a general or exploratory search for evidence. Such searches have always been condemned by this Court when made under the pretense of an incidental search when in fact they constituted a lawless invasion of a person's premises made in the hope that evidence of crime might be found. *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931); *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Marron v. United States*, 275 U.S. 192 (1927); *Gouled v. United States*, 255 U.S. 298 (1920).

Here the police officers entered the petitioner's premises ostensibly for the purpose of arresting her, but in reality with the object of conducting an exploratory search for merely evidentiary materials tending to connect the petitioner with some suspected offense. Under no circumstances can an arrest be used to conduct an exploratory search for evidence, thereby avoiding the strict constitutional requirements of a search warrant. *Preston v. United States*, 376 U.S. 364 (1964).

Since the police had ample time to secure a warrant for petitioner's arrest, they obviously had time to apply for a search warrant for her residence.

The principles, designed to preserve the privacy of a person's home, so painstakingly evolved by this Court in the *Marron, Lefkowitz* and *Gouled* cases, were left in a shambles by this outrageous police action. If these protections are to remain real, rather than merely rhetorical, then This writ should be granted.

(3) Seizure of Petitioner's Private Papers.

Private papers desired by the police merely for evidentiary purposes may not be seized, even if the search is truly incidental to a lawful arrest. *United States v. Lefkowitz*, 285 U.S. 452 (1932). Although this Court approved the seizure of some forms of evidence in *Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967), it was careful to exclude from its holding:

> . . . items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure. 387 U.S. at p. 303.

Even under a search warrant, the police may seize only a limited class of property. As an incident of an arrest, the officers likewise may take only objects which could have been taken under a search warrant. Certainly no court is authorized to issue a search warrant for the seizure of a person's private papers, personal correspondence and records used in publishing a magazine. Therefore, this unseemly seizure of all of the petitioner's letters and private files is precluded by both the Fourth and Fifth Amendments to the United States Constitution.

(4) No Probable Cause for Petitioner's Arrest.

A careful review of the facts shows that Officer Magnusson did not know what the petitioner would do to him until he arrived at her home. At that time, petitioner did indicate that she was going to whip him, with his consent. As it turned out she never actually did anything. This fact led the Appellate Division to find:

> . . . Indeed, it was almost certain that a criminal act *would have been* completed had the prearranged raid not interrupted the activities. (Emphasis supplied) 245 A.2d at p. 501.

As in most other states, New Jersey law requires that a crime be committed in the police officer's presence before

a person can be arrested, without a warrant, for a misdemeanor. *State v. Burnett*, 42 N.J. 377 (1964).

Clearly no crime had been committed or was being committed in the presence of the officer.

Since the search of the petitioner's home was without a search warrant or a valid arrest warrant and was not conducted with petitioner's consent, it could only be sustained as an incident to a valid warrantless arrest. If the arrest was unauthorized, then so was the search of the petitioner's home.

This Court discussed the state's authority to arrest a person without a warrant in *Beck v. Ohio*, 379 U.S. 89 (1964) and held:

> Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner *had committed or was committing an offense.* 379 U.S. at p. 91 (emphasis supplied).

See also, *State v. Burnett*, 42 N.J. 377, 201 A.2d 39 (1964).

To allow this conviction to stand would seriously depreciate this Court's decision in the *Beck* case and, thus, requires the granting of this writ.

2. An Act of Punishment When Committed by Two Consenting Adults, in Private, Cannot Constitutionally Be Rendered Criminal.

Section 115-1 of Title 2A of the New Jersey statutes provides in part:

> Any person who . . . in private commits an act of lewdness or carnal indecency with another, grossly scandalous and tending to debauch the morals and manners of the people, is guilty of a misdemeanor.

The New Jersey courts have ruled that any "lewd" sexual conduct, committed in private, either individually or consensually with a participant, is unlawful and may be punished by one year's imprisonment.

It is well settled that a state is only authorized to make criminal that conduct which in some way endangers the public. *Griswold v. Connecticut,* 381 U.S. 479 (1965).

The New Jersey courts acknowledged that under the common-law origin of Section 115-1 only public lewdness could be proscribed. *State v. White,* 129 N.J.L. 200, 28 A.2d 774 (Sup. Ct. 1942), *aff'd* on opinion below, 130 N.J.L. 527, 33 A.2d 815 (E. & A. 1943); *State v. Brenner, et al.,* 132 N.J.L. 607, 41 A.2d 532 (E. & A. 1945); *Schoudel v. State,* 57 N.J.L. 209, 30 A. 598 (Sup. Ct. 1894).

The New Jersey Appellate Division's interpretation in this case regulates "lewdness" in the abstract, i.e., lewd acts which harm or offend no one. Surely, the state can have no legitimate interest in regulating lewd acts which have no effect upon other members of the public. The New Jersey court's holding casts the shadow of Section 115-1 over all sexual acts, which may be called by some lewd, including conduct between married persons in the privacy of their own home. Such a construction is unprecedented and unthinkable. It ignores the legal limits of police power and punishes conduct which in no way impinges upon the rights of others, all in violation of the due process clause of the Fourteenth Amendment. *Griswold v. Connecticut, supra.*

The Model Penal Code recognizes that sexual conduct between consenting adults in private cannot be constitutionally proscribed. Model Penal Code, Section 213.2 (1962). The trial court below was unable to find any authority in the State of New Jersey:

> . . . holding that sado-masochistic behavior is criminal, where unaccompanied by other recognized criminal conduct, such as rape or indecent exposure. (24a)

In addition to giving Section 115-1 an unconstitutionally broad sweep, the Appellate Division has defined lewdness as "the irregular indulgence of lust, whether public or private." This ruling has further crippled the statute by rendering it unconstitutionally vague. Under this ambiguous interpretation the state has failed to adequately inform a person of what acts might be considered lewd. Adults are required to speculate at their own peril, when enjoying a consensual sex relationship in the privacy of their own home, as to whether it is lewd and unlawful. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

In *Griswold v. State of Connecticut*, 381 U.S. 479 (1965) this Court committed itself to extending the constitutional zone of privacy to marital relationships. Surely the constitutional principles relied upon there do not exclude persons who enjoy sexual relationships outside the precincts of marriage. For the rights of sexual minorities should be coextensive with rights enjoyed by the sexual majority. Surely an adult has a fundamental right of privacy which allows him to choose his own form of sexual satisfaction, to be enjoyed within the privacy of his own home, which must remain free from any interference by the state.

3. Under Recently Established Constitutional Standards *Spankers Monthly* Is Not Obscene.

Both the petitioners were convicted of the crime of possessing, with an intent to utter, obscene books, under Count Four of the indictment. The magazine involved was *Spankers Monthly*, together with several other books of a similar nature. The publications contained stories about the spanking of women, illustrated with some photographs of womens' bare buttocks being paddled or spanked.

On June 12th, 1967, the very day the trial of the case at bar began, this Court found a number of illustrated "spanking magazines" identical to the book at bar to be constitutionally protected. *Friedman v. New York*, 388 U.S. 441 (1967). (Among the books found not obscene were:

English Spanking School; Bound and Spanked; Sweeter Gwen and *Traveling Saleslady Gets Spanked.*)

During the course of the trial, the defense offered in evidence books and pictures similar to *Spankers Monthly* which had been found not obscene by this Court (see petitioner's exhibits D-9 and D-10, T.pp.3.7 to 3.12, 4.70). The Court's rejection of this evidence was reversible error. *Smith v. California,* 361 U.S. 147 (1959); *Yudkin v. State,* 299 Md. 233, 182 A.2d 798 (Ct. App., 1962); *In re Harris,* 16 Cal. 2d 889, 366 P.2d 305 (Sup. Ct. 1961).

4. None of the Foregoing Issues Have Been Rendered Moot by the Service of the Petitioner's Sentence.

This case has not been rendered moot by reason of the petitioner's service of her sentence. On September 6, 1968 deportation proceedings were instituted against the petitioner by the United States Department of Justice, Immigration and Naturalization Service, seeking her deportation because since petitioner's entry into the United States she has been convicted of two crimes involving moral turpitude under Section 241(a)(4) of Title 8, United States Code.[9] The deportation proceedings have been adjourned pending petitioner's application for certiorari to this Court.

The petitioner Beard's case has not been rendered moot because of the obvious adverse collateral legal consequences he will suffer, i.e., continued probationary supervision, ineligibility to serve on New York State juries and inability to hold union office. *Sibron v. New York,* 392 U.S. 40 (1968); *Carafas v. LaVallee,* 391 U.S. 234 (1968); *Ginsberg v. New York,* 390 U.S. 629 (1968).

---

[9]Petitioner's deportation is based upon her New Jersey convictions which are the subject of this appeal.

CONCLUSION

For the foreoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HERALD PRICE FAHRINGER
One Niagara Square
Buffalo, New York 14202

and

WILLIAM JOHN KEARNS, JR.
180 West State Street
Trenton, New Jersey 08608
Counsel for Petitioners

December , 1968.

APPENDIX A

102 N.J.Super. 102

STATE of New Jersey, Plaintiff-Respondent,

v.

Monique VON CLEEF and James Albert Beard, Defendants-Appellants.

No. A-191.

Superior Court of New Jersey
Appellate Division.

Argued May 27, 1968.

Decided July 2, 1968.

Defendants were convicted in the Essex County Court, Law Division, of conspiring to maintain building for purposes of lewdness and to commit acts of lewdness with others in private, permitting building to be used for purposes of lewdness and assignation with reasonable cause to know of such use, and possessing with intent to utter obscene publications, and they appealed. The Superior Court, Appellate Division, Carton, J. A. D., held, inter alia, that evidence sustained convictions.

Affirmed.

1. Arrest

Police officers who had reasonably justified belief that defendants were conspiring to maintain premises for purpose of lewdness and to commit acts of lewdness had probable cause for warrantless arrest; accordingly, arrests were valid.

2. Arrest

Search of home pursuant to lawful arrests was incidental to arrests and within permissible limits.

3. Conspiracy

Evidence sustained convictions for conspiring to commit acts of private lewdness and to maintain building for purpurposes of lewdness or assignation. N.J.S. 2A:115-1, 2A:133-2, subd. b, N.J.S.A.

4. Lewdness

Public lewdness was common-law crime requiring commission of act in public place and if act was committed in private, common-law did not reach it.

5. Lewdness

Third person's witnessing act of private lewdness is not element of offense. N.J.S. 2A:115-1, N.J.S.A.

6. Obscenity

Evidence sustained convictions for possession of obscene publications with intent to utter and expose them to view of others. N.J.S. 2A:115-2, N.J.S.A.

7. Obscenity

Where allegedly obscene material is designed for and directed toward clearly defined deviate sexual group, prurient appeal test is satisfied if material taken as a whole appeals to prurient interest of that deviant group.

8. Obscenity

In close obscenity cases, evidence that material was promoted by assertions of its appeal to prurient interests may be probative.

9. Obscenity

Mere possession of obscene material without intent to utter it or expose it to view of others does not violate New Jersey statute; proof that defendant was aware of contents of material in his possession is indispensable to conviction. N.J.S. 2A:115-2, N.J.S.A.

10. Criminal Law

Fact that jury reached conclusion that publication was obscene did not preclude Appellate Court from making independent examination of publication; indeed, Appellate Court had duty to do so. N.J.S. 2A:115-2 N.J.S.A.

11. Obscenity

Trial judge in obscenity prosecution need not admit into evidence publications adjudged not obscene for purposes of comparison with those in issue; such matter is properly left to discretion of trial court.

12. Criminal Law

Whether to continue obscenity prosecution to enable defendants to call another expert witness was matter for trial judge's discretion and it did not appear that discretion was abused.

Herald Price Fahringer, admitted pro haec vice, for appellants (Leonard Etz, Trenton, attorney, William J. Kearns, Jr., Trenton, of counsel).

Alan Silber, Asst. Prosecutor, for respondent (Joseph P. Lordi, County Prosecutor of Essex County, attorney).

Before Judges GOLDMANN, KILKENNY and CARTON.

The opinion of the court was delivered by

CARTON, J. A. D.

Defendants appeal from convictions of (1) conspiring to maintain a building for purposes of lewdness and to commit acts of lewdness with others in private, in violation of N.J.S. 2A:98-1, 2A:133-2 and 2A:115-1, N.J.S.A.; (2) permitting a building to be used for purposes of lewdness and assignation with reasonable cause to know of such use, in violation of N.J.S. 2A:133-2(b), N.J.S.A., and (3) possessing with intent to utter obscene publications, in violation of N.J.S. 2A:115-2, N.J.S.A.

Defendant Marianna, or Monique Von Cleef was sentenced on the conspiracy charge to a term of 18 months in the County Penitentiary (four months to be served in custody and the balance on probation). Defendant Beard was fined $500 on this charge and placed on probation for 18 months. The sentences were suspended as to both defendants on the remaining charges.

About the middle of October 1963 Detective Lieutenant Magnusson, Obscenity Investigations Specialist of the Essex County Sheriff's Office, received from a citizen a copy of a publication known as *Flair*. He gave it to John Kallies, Postal Obscenity Specialist for the New Jersey area and with whom Magnusson collaborated in investigating obscenity matters involving the United States mail.

Since Flair Publications was indicated as located in New York City, Kallies sent the copy of Flair there. Kallies reported to Magnusson that Flair had a post office box in New York City, signed for by a James Beard. Sometime before receiving this copy of Flair, Magnusson had obtained a copy of another similar publication known as La Plume, which he described as "one of the forerunners of the sex-type clubs * * * probably one of the most active in the country." Magnusson had learned through New York Postal Inspector Dolan that a photograph of Monique Von Cleef appeared in this particular edition with a code number of 174 and the following caption:

> "N.Y.C.—Exotic Miss, 30 yrs. 36-26-36. Extremely interested in rubberwear, satin, french lingerie, discipline, etc.; Anxious to experiment. Will correspond with all. Write descriptively. Photo appreciated."

Sometime in the middle of December 1965 a letter came into the hands of Inspector Kallies, addressed to one TS (initials ours), reading as follows:

> "T.
>
> My new telephone number is 201 484-0840. The charge for consultation is $50.00.
>
> /s/ Superior Monique"

Kallies turned this letter over to Magnusson, who ascertained on December 20 from the New Jersey Bell Telephone Company that the telephone number was registered or listed in the name of "Marianna Von Cleef, 850 Lake Street, Newark." The premises were owned by her. After a consultation with Inspector Kallies, he called that number and spoke to defendant Von Cleef, pretending that he was TS, the addressee of the letter. He made an appointment to meet her at 850 Lake Street the next day for the purpose of receiving "an hour and a half of discipline." This call was tape-recorded and immediately transcribed.

On December 21, Magnusson, Kallies and three other police officers went to the vicinity of 850 Lake Street at the appointed hour. Magnusson entered the building. The others remained outside in their vehicle until 1:30 P.M. pursuant to a pre-arranged plan that they enter the premises after half an hour. After being admitted by a workman and inquiring for "Monique," Magnusson was greeted by defendant Beard, who ushered him up to the second floor where he was told to wait for Monique. He testified that after a short time defendant Von Cleef came into the room saying to him, "Hello. You are Mr. S?" and when he replied, "Yes" she said "Come with me." She led him up a stairway to the third floor, through a bedroom and into what he described as a "living room or sitting room in the front of the house." She told him to take off his coat and to make himself comfortable.

Magnusson testified that at this point Miss Von Cleef handed him a copy of a publication called Spankers Monthly, asking him if he was familiar with it, to which he said, "Not specifically this one, but others like it." Then she said, "Let me get you a drink" and added, "You can read the publication. It will excite you."

Miss Von Cleef then left the room and came back in three or four minutes with a ten-ounce glass that had about five or six ounces of scotch in it and some water. "She gave it to me and told me 'You know, this will help you to relax' and she seated herself on the couch."

A conversation followed between them about Monique's career as a professional sadist. During this conversation there was a discussion of flagellation, sadism and transvestism. She inquired whether he was familiar with the La Plume publication, saying that she was familiar with it and knew the owner who had put her in contact with other people. Replying that he was acquainted with La Plume, he remarked to her: "That's where I first saw your picture, in La Plume." Magnusson also testified that he asked her if she did much of this type of thing, to which she replied that she was "very knowledgable" in this area and "has clients all over the country and flies to a lot of people to take care of this business." To his statement, "You must really know your business," she responded she was "quite experienced at this."

Asked to tell her about himself, he demurred, remarking that he could not say too much because he had to be "discreet." The following then took place:

> "* * * She said, 'How can I help you if you won't tell me about yourself?' I said, 'Well, I see what you mean.'
>
> * * *
>
> THE COURT: All right, you may continue.
>
> A. Well, I explained that I hadn't had too much experience at being the servant of a professional sadist, and she asked me, she said 'Well, when did you first start liking to be whipped? I said—let's see—I said that I had had an experience with a girl whom I knew and I went out with and we engaged in flagellation, and she would whip me to a point where I would be sexually aroused, and then we would consummate the normal sex act, and Miss Von Cleef at this point said, 'Well, I won't have intercourse with you.' I said, 'No. I realize that you're just going to whip me until I have an orgasm, and Miss Von Cleef said, 'Yes.'
>
> Q. Then what occurred, if anything? A. When she asked me about it, when did it first start, I also

> stated that you can't find too many people who know about this or who really understand it, and she acknowledged that, 'Yes, I understand that', and she made a reference that in Europe this practice is quite common and that she thoroughly understood it."

The discussion concluded with Magnusson's inquiry as to how long he could stay and her reply, "Oh, about a half hour or so, depending on how I like you, and so on." Magnusson stated that Miss Von Cleef then arose from the couch, produced a pair of women's high-heeled shoes, brought them over and dropped them on the floor saying: "Now take off all your clothes and put these on. * * *' When I come back, I want to see you on that bed in a kneeling position. * * * All your clothes off. I'm the boss."

The detective removed his tie, shirt, undershirt and shoes and socks. While defendant was out of the room, he opened a door into another room in which he observed a black object on legs having a hole in it, later identified as a torture box. As he looked out in the hall, he said he also saw Miss Von Cleef in the process of donning her costume. When she came back into the room she asked why he was not undressed and upbraided him for taking so long. She was attired, he said, in black high-heeled shoes, net stockings and a "tight-fitting rubber apparatus which would resemble a bathing suit." Saying that he was a little nervous, he proceeded to the lavatory. On the way there observed a strap about 16 inches long on the bed.

At this point the police officers burst into the room where they found Magnusson and Monique. Magnusson informed defendant she was under arrest and a thorough search of the entire house followed.

On the second floor were found and seized the following items: About 200 boxes containing copies of Flair; a box containing 200 applications for membership in the Flair Club; 20 catalogs listing items for sale in Flair; a mailing

list of over 20,000 names; 9 manila envelopes containing pictures of members of the Flair Club and a directory of its members; a Flair Enterprises checkbook; photographs, negatives, drawings and illustrations and other paraphernalia used in the publication of Flair; two filing cabinets and a file drawer containing about 2,000 names and addresses and 4,500 pieces of correspondence; a large quantity of photographs of defendant, some in various stages of nudity, in poses with other males and females; 200 photographs with accompanying stories and a roll of eight millimeter film.

The contents of a storage room on the second floor were also removed, consisting of seven cartons of unopened mail, a large number of forms, blank invoices and catalogs for Flair, a quantity of correspondence addressed to defendant Von Cleef, a "file" of correspondence addressed to persons with certain code numbers appearing in Flair, invoices, a series of letters addressed to defendant and 15 drawings.

From a room on the third floor called the "tower" were removed the black object which had been described as a "torture box," a large quantity of red rubber garments, various types of chains, paddles, whips, straps, straightjackets and padded clothing, various types of belts and other restraining devices taken from a dresser drawer, and two photo albums containing more pictures of defendant. Also taken from the tower room was a set of handcuffs attached to lengths of chain fastened to the ceiling and from another small room on the third floor were removed leather and rubber garments and other paraphernalia. In addition, the officers seized a large quantity of magazines and books.

Defendants' motion to suppress was denied and a considerable number of these items were introduced into evidence and described and commented upon by several witnesses during the trial.

In addition to the testimony of Detective Magnusson, testimony was developed from Postal Inspector Kallies as to the investigation of the publication of Flair and the defendants' connection with it. Various officers who participated

in the arrest of defendants gave essentially corroborative testimony as to the circumstances of the arrest and the events leading up to it. In addition, the State produced Dr. Chernus, a qualified psychiatrist, who testified that many of the publications seized and introduced into evidence were patently offensive because they affronted contemporary community standards, appealed to the prurient interest of those to which they were directed and were utterly without redeeming social value. Even the defense's expert, Dr. Caprio, although obviously more liberal in his views than Dr. Chernus, acknowledged that some of the printed materials seized were obscene.

The following questions are presented on this appeal and will be considered in the order advanced by defendants:

(1) Was the search and seizure conducted following the arrest of defendants unconstitutional?

(2) Did the State prove violations of N.J.S. 2A:115-1, N.J.S.A. (lewdness) and N.J.S. 2A:133-2(b), N.J.S.A. (occupying a building for purposes of lewdness or assignation)?

(3) Are the publications found on the premises obscene so as to warrant defendants' convictions for violation of N.J.S. 2A:115-2, N.J.S.A.?

I

[1] Defendants contend first that the search of defendant Von Cleef's home and the seizure of her papers and books was unconstitutional because made without a search or arrest warrant and not incidental to a valid arrest. They urge further, that even if the arrests were valid, the search which was made was exploratory and beyond the permissible scope of a search incidental to a valid arrest.

We note that although Detective Magnusson had in his possession at the time he arrested defendants two arrest warrants, these were held to be invalid by the trial judge at the hearing on the motion to suppress. Nevertheless, he ruled that the search was proper because it followed a lawful arrest which was based on Magnusson's having

reasonable grounds to believe an offense punishable by imprisonment for more than one year, namely, uttering an obscene publication in violation of N.J.S. 2A:115-2, N.J.S.A., was being committed. Much of defendants' brief is devoted to an attack on the basic premise of this ruling of the trial judge. The essence of defendants' argument in this respect is that probable cause involving a violation of an obscenity statute cannot be ascertained by a law enforcement officer alone; rather, a judicial determination is said to be required. See Marcus v. Search Warrants, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961), and State v. Parisi, 76 N.J.Super. 115, 183 A.2d 801 (Cty.Ct. 1962).

We find no necessity for determining the correctness of the trial judge's ruling in this respect because we are satisfied that under the circumstances in this case there existed adequate cause for belief that other offenses punishable by more than one year in prison were being committed by defendants. See State v. Doyle, 42 N.J. 334, 348-349, 200 A.2d 606 (1964). The facts known to the officer at the time of the arrest, including Miss Von Cleef's representations as to her past experiences and intentions with regard to Magnusson's "treatment," in our view clearly provided probable cause for believing that defendant Von Cleef was knowingly occupying her premises for purposes of lewdness or assignation, in violation of N.J.S. 2A:133-2, N.J.S.A. Additionally, these facts reasonably justified the belief that defendants were conspiring to maintain the premises for the purpose of lewdness and to commit acts of lewdness in violation of N.J.S. 2A:98-1, 2A:133-2 and 2A:115-1, N.J.S.A.

Let us briefly review the totality of those facts known to the police when the arrests and resultant search were made. During the course of an obscenity investigation in which Magnusson had been collaborating with the United States Post Office officials, Detective Magnusson had received a copy of the Flair and La Plume publications which he knew catered and were designed to appeal to persons "who were masochistic." Magnusson had been

assigned for eight years to the special investigation division dealing with obscenity. He had had considerable training in the field of pornography, with special emphasis on sexual aberrations, including those dealing with homosexuality, transvestism, voyeurism, sadism and masochism. He had participated in almost 600 obscenity investigations. Magnusson knew that a James Beard had signed for the post office box in New York for Flair. The New York postal authorities had called his attention to the coded advertisement which appeared in La Plume accompanying the photograph said to be Monique Von Cleef. His telephone call after receipt of the letter from "Superior Monique" to TS confirmed the fact that the person advertising in La Plume and defendant Von Cleef were one and the same. He knew that she had agreed to perform an act of sadomasochism. Everything that followed his entry into the building at 850 Lake Street confirmed that agreement or plan. Indeed, it was almost certain that a criminal act would have been completed had the prearranged raid not interrupted the activities.

As our Supreme Court has noted, the specialized training and experience of police officers must be taken into account in assessing the propriety of their actions in ferreting out furtive and ingenious activities. See State v. Contursi, 44 N.J. 422, 431, 209 A.2d 829 (1965). Even more so is this true of police experts. Considering Detective Lieutenant Magnusson's experience in the field of pornography and sexual aberrations, taken in conjunction with the facts known to him at the time of the arrest, we are wholly satisfied that there existed a sufficient basis for a finding of probable cause. We hold, therefore, that the arrests were valid.

[2] Since the arrests were valid, we have no difficulty in concluding that the search and seizure of the various articles produced at the trial were incidental to the arrests and were within permissible limits.

The general rule in cases of this kind is quite clear: "[T]he premises where the arrest was made, which prem-

ises were under the control of the person arrested and where the crime was being committed, [are] subject to search without a search warrant." United States v. Rabinowitz, 339 U.S. 56, 61, 70 S.Ct. 430, 433, 94 L.Ed. 653, 658 (1950). The test is always whether the search was reasonable. Id., 339 U.S., at p. 66, 70 S.Ct., at p. 435, 94 L.Ed., at p. 660.

In the present case the search was extensive, but under the circumstances it was reasonable. The premises were owned by Miss Von Cleef and the items searched for and seized related to the criminal operation for which the arrest had been made. On these facts, where the crime alleged involved a vast business enterprise using the entire premises owned and controlled by the person arrested, such a search must be deemed valid. See State v. Doyle, 42 N.J. 334, 344, 200 A.2d 606 (1964); Annotation, 4 L.Ed.2d 1982 (1960).

II.

[3] The essence of defendants' second contention is that "an act of punishment when committed by two consenting adults in private is not rendered criminal" by N.J.S. 2A:115-1 or 2A:133-2(b), N.J.S.A. As a result, it is argued defendants' convictions for conspiring to commit acts of lewdness, in violation of N.J.S. 2A:115-1, N.J.S.A. and for maintaining premises for the purposes of lewdness, in violation of N.J.S. 2A:133-2(b), N.J.S.A., cannot be sustained.

N.J.S. 2A:115-1, N.J.S.A. provides:

> "Any person who commits open lewdness or a notorious act of public indecency, grossly scandalous and tending to debauch the morals and manners of the people, or in private commits an act of lewdness or carnal indecency with another, grossly scandalous and tending to debauch the morals and manners of the people, is guilty of a misdemeanor."

The statute delineates two separate offenses: (1) public lewdness and (2) private lewdness. In this case conspiracy

to commit only private lewdness was charged under this provision of the statute. Under N.J.S. 2A:133-2(b), N.J.S.A. defendants were also charged with permitting and conspiring to permit defendant Von Cleef's premises to be used for purposes of lewdness and assignation.

[4] Certain general principles may be stated by way of introduction. "Lewdness" has been defined as "the irregular indulgence of lust, whether public or private." State v. Baldino, 11 N.J.Super. 158, 162, 78 A.2d 95, 97 (App.Div. 1951). Public lewdness was a common-law crime requiring commission of the act in a public place; if the act was committed in private, the common law did not reach it. See Schoudel v. State, 57 N.J.L. 209, 210, 30 A. 598 (Sup. Ct. 1894). Prior to 1906 New Jersey's criminal statutes simply restated the common law as to public lewdness; there was no provision designed to prohibit lewd acts performed in private. But in 1906 the statute was amended to include those acts committed in private with another person. See State v. Brenner, 132 N.J.L. 607, 610, 41 A.2d 532 (E. & A. 1945); State v. Michalis, 99 N.J.L. 31, 33, 122 A. 538 (Sup.Ct. 1923).

In light of the common-law and legislative background of N.J.S. 2A:115-1, N.J.S.A., therefore, it would appear that the statute means precisely what it says; i.e., "Any person who * * * in private commits an act of lewdness * * * with another, grossly scandalous and tending to debauch the morals and manners of the people, is guilty of a misdemeanor." As the plain language suggests, the elements of the offense are the commission of a lewd act in private with another person which act tends to debauch the public morals.

[5] Nevertheless, defendants attempt to inject an additional requirement into the offense, namely, that the lewd act be witnessed by one who is not a participant and whose morals are debauched thereby. Defendants would read the statute as if "with another" meant "in the presence of another who is a nonparticipant." This construction is

untenable; the statute explicitly applies to an accused who "*commits* an act of lewdness * * * *with* another." It obviously includes participants. Nor are we persuaded that the clause "grossly scandalous and tending to debauch the morals and manners of the people" adds weight to the argument that the presence of a third person is requisite to charge the statutory offense. The purpose of this language is merely to characterize the gross nature of the offense.

Defendants' claim that the statute has never been applied to a situation in which the participants witnessed the act is erroneous. In State v. Michalis, supra, defendant was convicted for private lewdness committed "with James Drake." No mention of a nonparticipating witness appears in the opinion.

Neither State v. White, 129 N.J.L. 200, 28 A.2d 774 (Sup.Ct.1942), affirmed on opinion below 130 N.J.L. 527, 33 A.2d (E. & A. 1953), nor State v. Brenner, supra, lend support to defendants' contention. In *White* the court was called upon to determine whether an indictment alleging that defendant "[w]as in private guilty of an act of lewdness * * * by engaging in certain acts and practices so obscene and indecent that a minute description of the same would be offensive to the Court * * * wherefore a fuller description of the same is not set forth," effectively charged the commission of a crime. It simply held that the indictment was defective for failing to include, as required by the statute, an allegation that the act had also been committed "*with another.*" The cryptic opinion of the court fails to define the key phrase "with another." We do not read *White* to require the presence of more than the participants to constitute the statutory offense. Similarly, in *Brennan* the court held that adultery and fornication committed in private between two consenting adults did not violate the statute because, *and only because,* adultery and fornication were not lewd acts if committed in private. Defendants' reliance upon these cases is, therefore, misplaced.

On the other hand, the clear language of the statute and its history militate in favor of its applicability to the present case.

Defendants' contention that an act of punishment by two consenting adults in private is not rendered criminal by N.J.S. 2A:133-2(b), N.J.S.A. is even weaker than their similar argument with respect to N.J.S. 2A:115-1, N.J.S.A. N.J.S. 2A:133-2, N.J.S.A. provides, in pertinent part:

> "Any person who:
>
> * * *
>
> b. Occupies any place, structure, [or] building * * * for the purpose of * * * lewdness or assignation, or permits any place, structure [or] building * * * owned or controlled by him to be used for such purpose, with * * * reasonable cause to know that the same is or is to be, used for such purpose * * *
>
> * * *
>
> Is guilty of a misdemeanor."

This statute does not contain the phrase "with another" nor does it define the terms "lewdness" or "assignation." The argument that N.J.S. 2A:133-2(b), N.J.S.A. depends for its definition of "lewdness" upon N.J.S. 2A:115-1, N.J.S.A. is untenable for the latter statute likewise contains no definition of that term. Instead, as we have seen "lewdness" has been defined by our case law as "the irregular indulgence of lust, whether public or private." "Assignation" means "'an appointment of time and place for meeting or interview;—used chiefly of love interviews and now commonly in a bad sense.'" State v. Baldino, supra.

The proof was plenary on both charges. The evidence as to what transpired up to the time the officers came upon the scene in Miss Von Cleef's parlor, if believed, alone fully supported the conspiracy charges and went far down the path towards proving the others.

Magnusson described sadism as the "inflicting of pain on another human being for sexual gratification, either degra-

dation or corporal flagellation," and masochism as the "sexual gratification to the receiving of pain and degradation and humiliation." The performance about to be completed by defendant when she was interrupted by the raiding officers certainly involved elements of sadism and masochism, or sadomasochism, as the two terms are sometimes used together. It hardly requires argument that the act involved was of a lewd character measured by any acceptable definition. Even Dr. Caprio, the psychiatrist who testified on behalf of defendants, acknowledged that an act of flagellation on a stranger which is taken to the point of achieving an orgasm usually must be considered as a lewd act.

The evidence also justified the jury in concluding that this was not simply an isolated erotic episode on the part of defendant Von Cleef, but was representative of other acts of perversion being carried on by these defendants at the premises as a part of a far-flung commercial enterprise. We now turn to a brief review of that evidence.

There was testimony on the part of Inspector Dolan, who was assigned in New York to investigate obscenity materials going through the mails, that his office started an investigation of the Flair publication as early as April 1965. His investigation disclosed that Albert J. Beard, as president of Flair Enterprises, had applied on November 12, 1964 for a post office box at the Murray Hill Station, describing Flair as a mail forwarding service magazine club. Defendant Von Cleef had obtained Box #158 in her name at the Lenox Hill Station in January 1965, and 850 Lake Street in Newark had been given as a forwarding address for that box in October 1965.

Flair Enterprises also made application to First National City Bank to open a checking account. This application recited the concern's business as "Magazine Flair." It was signed by Beard as owner. Filed with it was a power of attorney from him designating one M. B. Moore as his attorney authorized to deposit, draw and make checks with respect to the business transacted through that bank.

Defendants' attorney stipulated at the trial that Monique Von Cleef, also known as Marianna Von Cleef, was Maria B. Moore and was the same person named in the power of attorney.

Detective Magnusson explained the mechanics of an operation like Flair or La Plume:

> "* * * [T]hey buy what is referred to commonly as a sucker list. * * *
>
> Now what he does is put out his little brochures. Once he is established in business and he mails them to individuals, this is the way the club is perpetrated and goes on and on and enlarges.
>
> Now, any of the individuals receiving a solicitation from this are invited to scan the publications. They are offered to put an ad in here for a price, and they are given a code number to insure that it is very discreet and confidential. Then, if they wish to reply to any of the ads in this particular publication, they must forward a letter in a plain envelope, using the code number somewhere on the envelope. They put this envelope in another envelope and seal it up, put a stamp on it, and it has to be sent to the operator of this club.
>
> The operator of this club then will open the original envelope, take out the one that is marked for whatever code number is represented on it, and then he will, in turn, forward them on.
>
> * * *
>
> Once the operator of this gets the transmission, let's say, from an individual who answered an ad here, he will send it on to that individual, and now these two people are in direct contact where they actually no longer need the services of this publication. But it has been our experience that these people not only contact others; they put an ad in themselves and then start to receive mail. So it just starts to keep growing and growing and growing. It's an expanding operation. It's one of the biggest things going on in this country today."

Produced before the jury were hundreds of application forms of individuals seeking to join the Flair Club, along with a ringed notebook containing a master file of names and addresses of correspondents from many states, sometimes accompanied by photographs. Alongside the names of some of the individuals were notations as to prices and the sexual activity in which the correspondent had evidenced interest. Making the records complete were filing cabinets containing filing cards constituting the basic record of the individuals with whom contact was made.

In addition, there was a large quantity of letters from various individuals addressed to "Monique" and "Mistress Monique," which Magnusson testified were "solicitations for various types of sexual activity," in some cases detailing minutely in four-letter language the natural and perverted acts referred to. Samples of these letters were read to the jury. Included among these was a series of letters from the individual whose letter sparked the investigation, some addressed to "Mistress Monique" and some to other persons, and in some cases mentioning advertisements appearing in Flair. These letters, written in a special vernacular commonly understood by sadomasochists, leave little doubt as to the character of the activities contemplated. The writer on numerous occasions refers to himself as a "slave" and expresses a wish to do anything his "mistress" or "queen" desires. One of the less offensive will serve as an example:

> "Let me introduce myself– * * * very docile–friendly submissive to all.
>
> I am interested in all things of the bizarre–bondage–forceful restraint–chastisement–photography–My first love is "French devotion" (females only).
>
> I have had some experience in the above.
>
> * * *
>
> Also an amateur transvestite–(black nylon lace (sheer) lingerie).

Will pose for polaroid shots with single or several females.

* * *"

Also exhibited to the jury and marked in evidence were the tools of this exotic trade: chains used as restraining devices, including one bearing a legend on the metal face, "Slave Samuel. Property of Monique."; several dildos; a leather paddle; a straightjacket; various types of belts; padded clothes and other devices. Detective Magnusson explained the significance of these items and also described the use of the "torture box" found on the premises. In addition, 18 photographs were introduced into evidence picturing defendant Von Cleef in various stages of nudity, brandishing a whip, apparently in the process of administering "discipline" to male or female participants restrained by chains or other bondage.

Finally, there were marked in evidence a series of books found on the premises as the result of the search, the titles of which sufficiently indicate their nature: Buttock Fetishism, Whip and Lash (by "Will Beatum"), Bound and Transformed, The Autobiography of a Flea, It's Delightful, The 120 Days of Sodom (by the Marquis DeSade), Lady Susan's Cruel Lover, Skirted Man, Teenage Discipline, Hermaphrodite in Silks, Dominant Female, and Spankers Monthly.

The foregoing is merely a brief summary of some of the salient evidence described in the 1,000-page record of the trial. Coupled with the proof of defendants' activities as described by various witnesses, it established beyond question the existence of a system of commercial exploitation of people with sadomasochistic sexual aberrations. It far transcends the situation which appellants would characterize as a simple act involving two consenting adults performed in private. Rather, the record reveals a wide system of solicitation and evidence from which a jury could reasonably infer that lewd acts were performed on the premises for profit.

III.

[6] Finally defendants claim that their convictions for possession of obscene publications with intent to utter and expose them to the view of others in violation of N.J.S. 2A:115-2, N.J.S.A. cannot be sustained. They argue: (1) Spankers Monthly is not obscene; (2) other publications found on the premises were not properly in issue, and (3) the trial court abused its discretion in refusing to grant a continuance to permit defendants to call another expert witness.

[7,8] Preliminarily, it is necessary to establish a framework for dealing with the first two contentions. The Supreme Court has established three elements which must coalesce in order for a publication to be adjudged obscene:

> "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413, 418, 86 S.Ct. 975, 977, 16 L.Ed.2d 1, 6 (1966).

Where the material is designed for and directed toward a clearly defined deviant sexual group, the prurient appeal test is satisfied if the material taken as a whole appeals to the prurient interest of that deviant group. Mishkin v. State of New York, 383 U.S. 502, 508, 86 S.Ct. 958, 16 L.Ed.2d 56, 62 (1966). In close cases, evidence that the material was promoted by assertions of its appeal to prurient interests may be probative. Ginzburg v. United States, 383 U.S. 463, 474-475, 86 S.Ct. 942, 16 L.Ed.2d 31, 40 (1966).

[9] New Jersey decisions involving N.J.S. 2A:115-2, N.J.S.A. have also established that mere possession of obscene material without an intent to utter or expose it to

the view of others does not violate the statute. See State v. Kohler, 40 N.J.Super. 600, 604-605, 123 A.2d 881 (App. Div.1956). Moreover, proof that defendant was aware of the contents of the material in his possession, commonly referred to as *scienter*, is indispensable to a conviction. See State v. Hudson County News Co., 41 N.J. 247, 257, 196 A.2d 225 (1963); State v. Hudson County News Co., 35 N.J. 284, 294, 173 A.2d 20 (1961).

Turning now to defendants' first argument, that Spankers Monthly is not obscene, it is readily apparent that the publication satisfies the three elements necessary to establish obscenity. The State's expert, Dr. Chernus, so testified at the trial. It was described as having a dominant appeal to the prurient interests of sadomasochists, being patently offensive to contemporary community standards, and being utterly without redeeming social value. Defendants' expert, Dr. Caprio, testified to the contrary. Based upon the evidence presented, however, the jury could reasonably conclude that Spankers Monthly is obscene.

[10] The fact that a jury reached such a conclusion does not preclude this court from making an independent examination of the publication; indeed, it has a duty to do so. See Jacobellis v. State of Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964). Our independent examination of this publication convinces us that it is not entitled to protection under the First and Fourteenth Amendments.

Nor can it be argued that defendants did not possess Spankers Monthly with intent to utter or expose it to the view of others. The publication was, in fact, given to Detective Magnusson by defendant Von Cleef. Moreover, her statement to Magnusson that he should read Spankers Monthly because it would excite him negates any claim that she was unaware of its contents. This comment by Miss Von Cleef would appear to be probative also on the question of the magazine's appeal to prurient interests under Ginzburg v. United States, supra.

[11] Contrary to defendants' contention, there is no requirement that a trial judge admit into evidence publications adjudged not obscene for purposes of comparison with those in issue. To so hold would obviously result in the introduction of collateral issues making the trial unmanageably complex. Such matters seem better left to the discretion of the trial court in accordance with Rule 4 of the New Jersey Rules of Evidence. One court has already adopted a similar approach. See, Books, Inc. v. United States, 358 F.2d 935, 939 (1 Cir. 1966), reversed per curiam on other grounds 388 U.S. 449, 87 S.Ct. 2098, 18 L.Ed.2d 1311 (1967).

Defendants' argument that other publications found on the premises were not properly at issue in the present case is devoid of merit. The elements of the offense claimed by defendant to have been absent, namely *scienter* and an intent to utter or expose them to the view of another, were plainly supplied by permissible inference. Considering the nature of the business defendants were in, the "services" they rendered, and the use to which Spankers Monthly was put in the presence of Detective Magnusson, it was certainly inferable that defendants knew the contents of the other books and intended to use them as they did Spankers Monthly. Since both experts testified that some of these other publications were obscene according to constitutional standards, the evidence at trial and an independent examination of them supports the jury's finding and the obscenity convictions on this ground also.

[12] Defendants also argue that the trial judge erred in refusing to continue the case for another day to enable them to call another expert witness. This was a matter for the discretion of the trial judge. There was no abuse of discretion.

Affirmed.

APPENDIX B

OPINION

Argued: January 9, 1967
Decided: February 10, 1967

Mr. Harry P. Durkin, for the defendants

Mr. John W. Noonan, Assistant Prosecutor for the plaintiff (*Mr. Brendan T. Byrne,* Prosecutor of Essex County).

KAPP, J.C.C.

This is a motion pursuant to *R. R.* 3:2A-6, to suppress evidence seized by the Sheriff of Essex County from the premises of the defendant Von Cleef at 850 Lake Street in the City of Newark.

It appears that sometime during the month of October, 1965, the Sheriff received a copy of "Flair", a pamphlet which had been sent to a citizen through the mail. Simply stated, "Flair" is a directory of those who capitalize on, and associate and fraternize with sex deviants. It contains a listing of "services" including invitations and opportunities for homosexual debaucheries and for perverted sexual gratification via sadism, masochism and transvestism. Each listing is accompanied by a code number, and the reader is urged to correspond with "Flair" using the given particular number as attracted. None of the listings contain names or addresses, and all contacts are made through "Flair" acting as intermediary and as a clearing house.

An investigation revealed that "Flair" originated in New York City where a post office box was maintained and that mail which it received was signed for by James Baird. During the course of the investigation a letter addressed to one Ted Sullivan by Von Cleef was intercepted by the authorities. The letter stated that a "consult" would cost $50.00 and gave the defendant's new telephone number. As the defendant's telephone number related to a Newark exchange, it was referred to the Sheriff of Essex County.

The Sheriff was also informed that Monique Von Cleef had placed an advertisement in volume 4 of "La Plume", a pamphlet similar to "Flair". The only difference between these publications is that some of the listings in "La Plume" are accompanied by photographs depicting the advertisers in bizarre costumes and poses. The defendant Monique Von Cleef is pictured on the 6th page in severe high-heeled boots with the following caption:

> "N.Y.C.—Exotic Miss, 30 yrs. 36-26-36. Extremely interested in rubberwear, satin, french lingerie, discipline, etc.; Anxious to experiment. Will correspond with all. Write descriptively. Photo appreciated."

So it was, that at 11:30 a.m., on the 20th of December, 1965, Detective Magnusson of the Sheriff's Office telephoned Miss Von Cleef at the Newark number, posing as Ted Sullivan. A dictaphone was attached to the telephone and the officer was able to place a true and accurate transcription of the entire conversation on the record. The purpose of the telephone conversation was to arrange a meeting with Miss Von Cleef. To this she agreed and a meeting was set for the following day at 1 p.m. However, the transcript of the conversation leaves us with some doubt as to what would transpire on the following day. The pertinent portion of the conversation follows:

> Magnusson: "Could you tell me what you do for the fee, you know?"
>
> Von Cleef: "Of just an hour and a half of discipline."
>
> Magnusson: "Yeah. Do you think I could get it without clothes on, just the high heels?"
>
> Von Cleef: "Oh, we'll talk about it later."
>
> Magnusson: "Heh?"
>
> Von Cleef: "I would want to talk with you first."

On the basis of the above stated facts, Magnusson obtained two arrest warrants in the Newark Municipal Court. These warrants were for violation of *N.J.S.* 2:170-5,

soliciting for an immoral purpose, and for maintaining a disorderly house under the municipal ordinance.

Armed with the warrants and accompanied by two detectives, a policewoman and postal inspector, Magnusson proceeded to the Lake Street address. By agreement, Magnusson was to enter the house alone at the appointed hour posing as Ted Sullivan, and that he would attempt, at the appropriate time, to signal the raiding party by telephone. However, as Magnusson did not know what might befall him, the raiding party was instructed to enter the building in half an hour.

The ruse was carried out with success. Miss Von Cleef welcomed Magnusson and took him to a room on the third floor where he was given a drink and a copy of "Spankers Monthly", which she said would arouse him. Thereafter the defendant and Magnusson spent some time in conversation concerning his "disciplinary" likes and dislikes. He told the defendant that he enjoyed being whipped until fully aroused, then to "finish in normal sexual relation." To this the defendant quickly replied, "Well, I won't have intercourse with you, just the punishment."

The defendant then stated that she would prepare herself for the discipline and instructed Magnusson to remove all of his clothing, to put on a pair of high-heeled woman's shoes, and then to kneel on a bed in an adjacent room. The detective removed his shirt and shoes and then requested the use of the bathroom facilities as a delaying tactic. On his return he observed Miss Von Cleef attired in a black rubber bathing suit, with net stockings and wearing severe high-heeled shoes. A sixteen inch leather strap was lying on the bed.

Fortunately, for Magnusson, these bizarre activities had not commenced as it was at this point that the raiding party entered the building. The arrest warrants were exhibited to the defendant and she was told that she was under arrest. She was thereupon advised of her constitutional rights, and given the opportunity to call her attorney. Once

the telephone calls had been made, the officers commenced a search of the premises. Among the items seized were the leather strap and "Spankers Monthly" previously mentioned as well as a "torture box", whips, chains, "dildos", photographs, opened correspondence, "Flair" business records, restraining devices, so-called, straight jackets, rubber clothing, and barbiturates.

The defendant contends that the warrants and the subsequent arrest were defective, and hence the search that took place incident to that arrest was illegal. Some of the bases now urged for invalidating the arrest and search were, that (1) the complaint failed to state essential facts upon which probable cause could be based, (2) no crime had been committed; and (3) the search was one for discovery of evidence in violation of defendant's federal constitutional rights.

The arrest warrants unquestionably were defective in several respects. Detective Magnusson readily admitted that the complaints which he signed did not contain a statement of the essential facts. There was merely a brief reference to the two offenses charged. But *R. R.* 3:2-1 requires a complaint to state "the essential facts constituting the offenses charged." *R. R.* 3:2-2 in turn permits the issuance of an arrest warrant where "it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it . . ." In the absence of a statement of the essential facts how can there be any finding of probable cause upon which to base a warrant?

Even if the complaints had contained all facts known to the officer, the warrant would still be defective for the reason that the available intelligence did not constitute such probable cause as to give rise to the belief that an offense had been committed. When the warrants were sought, Magnusson was aware of the defendant's unusual and curious, but nevertheless vague advertisement in "La Plume"; her short and nonincriminatory note to Ted Sullivan, and her

noncommittal telephone conversation. On the basis of these facts it is difficult to find that a crime had been committed.

The fair inference to be drawn from these facts is that the defendant was engaging in some sort of sadistic behavior. However, is sadism a crime, *per se*, in the absence of any accompanying nudity or other criminally interdicted cruel and inhuman conduct? In this latter regard it must be borne in mind that even Detective Magnusson, as a "specialist" in this field, recognized the fine line between pleasure and pain. Furthermore, the court is unable to find any precedent holding that sado-masochistic behavior is criminal, where unaccompanied by other recognized criminal conduct, such as rape or indecent exposure. In fact, C.J.S. defines "sadism" and "masochism" as "*A mental disease* in which the sexual instinct is abnormal or perverted." Vol. 44, "Insane Persons," Sec. 2, p. 43 (emphasis supplied). Also see *State v. Petty*, 32 Nev. 384, 108 P. 934 (Sup. Ct. 1910), where the defense of "sadistic insanity" was interposed to a charge of uxoricide.

However, the fact that these arrest warrants are ineffectual, can nevertheless have no bearing on the outcome of this motion for the reason that Detective Magnusson did not utilize the warrants in any way in order to gain entry to the defendant's premises. The fact is that the entry here was made by a legally sanctioned ruse or subterfuge. *State v. Dennis*, 43 N.J. 418 (1964). Furthermore, at the time that the defendant was actually arrested, Detective Magnusson had reasonable grounds to believe that an offense, interdicted by our criminal law, had been committed, and one that was punishable by more than one year in state's prison. *State v. Doyle*, 42 N.J. 334 (1964). That offense was the act of giving Detective Magnusson a copy of "Spankers Monthly", an obscene publication, contrary to the provisions of *N.J.S.* 2A:115-2. Other crimes may also have been committed in Magnusson's presence, then and there at the Lake Street address, but for the purposes of this motion it is only necessary to find but one.

The scandalous "Spankers Monthly" is a publication that appears to be devoted exclusively to the interests of sadists and masochists and to other sexually deviant and sexually curious persons bent upon the bizarre or perverted, who prefer spanking and brutal whipping to the normal sexual relation. The photograph on the cover of this copy of the publication vividly pictures a woman's bared buttocks covered with welts and bruises. The textual material extolls the virtues of spanking, *ad nauseam,* and relates, with great intimacy of detail, the experiences of various women who achieved sexual orgasm, albeit vicariously, through such "chastisements" and spankings. Interspersed through the text are other lurid photographs and illustrations of bound and physically restrained persons who are being beaten, whipped and flagellated, as well as solicitations for such opportunities or engagements similar to those found in "La Plume".

This publication, as a whole, has no redeeming social value, goes far beyond the customary limits of candor, and unquestionably appeals to "prurient interest". *Roth v. United States,* 354 U.S. 476 (1957); *State v. Hudson County News Co.,* 41 N.J. 247 (1963). The fact that this publication is directed toward a deviant group and that it would not appeal to the prurient interest of the average man under the test set forth in *Jacobellis v. Ohio,* 378 U.S. 184 (1964), is not of moment. Mr. Justice Brennan, in a recent decision expressed the view that where such material is directed at a deviant group, "social realities" then require that the prurient-appeal requirement "be assessed in terms of the sexual interests of its intended and probable recipient group." *Mishkin v. State of New York,* 86 S. Ct. 958, 964 (1966).

Now as to the defendant's contention that the search was one for mere evidence, it is necessary to distinguish private papers from other tangible evidence. It is well established in New Jersey that objects, other than the fruits of crime, instrumentalities for the commission of crime, or

contraband, may be seized for their evidential value. *R. R.* 3:2A-2, *State v. Bisaccia,* 45 N.J. 504 (1965). Private papers, however, are accorded a preferred position, with the exception of papers used in a criminal operation.

> "Subsequent cases make it clear that the private papers of an individual may be seized and introduced into evidence if the papers were used in the criminal operation. See *Marron v. United States,* 275 U.S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (1927); *United States v. Lefkowitz,* 285 U.S. 452, 52 S. Ct. 420, 76 L. Ed. 877 (1932); *Davis v. United States,* 328 U.S. 582, 66 S. Ct. 1256, 90 L. Ed. 1453 (1946); *Zap v. United States,* 328 U.S. 624, 66 S. Ct. 1277, 90 L. Ed. 1477 (1946); *Harris v. United States,* 331 U.S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399 (1947); *Abel v. United States,* 362 U.S. 217, 8 S.Ct. 683, 4 L. Ed. at 668 (1960)." *State v. Bisaccia,* 45 N.J. 504, 515 (1965).

In light of the observations made by Detective Magnusson at the Lake Street address on December 21, it would appear that the papers seized were used in the alleged criminal operation. The very nature of the items seized bespeak their importance to the "Flair" publication, and the rendering of any "services" advertised therein. A more detailed list of the papers seized follows:

1. Seven cartons of opened mail, approximately 4,000 letters, received by the defendant in connection with a "Sex exchange club operating under the name of Flair Enterprises; many contained photographs of the sender, some patently lewd and obscene.
2. Two gray filing cabinets containing several thousands of names of persons connected with the Flair operation.
3. One hundred applications for advertisements in "Flair", all of a sexual or sexual deviate nature.
4. A checkbook, for Flair Enterprises.

5. Twenty sheets of typed carbon showing defendant's change of address, to the instant premises.
6. Twenty thousand names and addresses on sheets with gummed labels, comprising mailing lists of persons who would be interested in such illicit sexual or perverted assignations or debaucheries, or who were susceptible to such practices.
7. Three record books with names, addresses, pictures, "desires" and prices.

Since the papers were reasonably within the possession and control of the defendant, *State v. Mausert*, 88 N.J.L. 286 (E. & A. 1915), their seizure was proper.

Accordingly, the motion to suppress is denied.

APPENDIX C

SUPREME COURT OF NEW JERSEY
C-48 September Term 1968

State of New Jersey,
Plaintiff-Respondent,

vs.

Monique Von Cleef, et al.,
Defendants-Petitioners.

On Petition for Certification
Order Denying Petition

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 17th day of September, 1968.

A TRUE COPY

/s/ John H. Gildea, Clerk
Clerk of the Supreme Court

[Filed: Sep. 17, 1968]
/s/ John H. Gildea, Clerk

SUPREME COURT, U. S.
FILED
MAR 20 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1968

No. 837

MONIQUE VonCLEEF and
JAMES ALBERT BEARD,
Petitioners,

vs.

STATE OF NEW JERSEY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY

STATE'S BRIEF IN OPPOSITION

JOSEPH P. LORDI,
County Prosecutor of Essex County,
New Jersey,
Attorney for Respondent,
Essex County Court House,
Newark, New Jersey, 07102.

ALAN SILBER,
PAUL MURPHY,
Assistant County Prosecutors,
On the Brief.

Allens Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-9611-12

TABLE OF CONTENTS

	PAGE
COUNTER-QUESTIONS PRESENTED	1
COUNTER-STATEMENT OF FACTS	2
REASONS THE WRIT SHOULD NOT BE GRANTED	9
1. The Search Was Reasonable	9
A. There Was Probable Cause for the Arrest of Petitioner	9
B. The Scope of the Search Incident to a Valid Arrest Was Not Unreasonable	10
2. The Constitution Does Not Prohibit the State from Making Criminal a Commercial Enterprise in Which Petitioners Disciplined and Punished. People with a Sado-Masochistic Sexual Abberation for Profit	12
3. The Books and Materials Seized Were Obscene, Especially When Viewed as Part of the Far-Flung Commercial Enterprise to Exploit People Suffering from a Sado-Masochistic Sexual Abberation	14
4. The Due Process Clause of the Fourteenth Amendment Does Not Require That Evidence of Other Publications Held Not Obscene by This Court be Admitted into Evidence	16
CONCLUSION	17

PAGE

Cases Cited

Beck v. Ohio, 379 U. S. 89 (1964) 9

Books, Inc. v. United States, 358 F. 2d 935 (1st Cir. 1966), reversed per curiam on other grounds, 388 U. S. 449 (1967) 16

Cooper v. California, 386 U. S. 58 (1967) 11

Dombroski v. Pfister, 380 U. S. 479 (1965) 13fn

Épton v. New York, 390 U. S. 29 (1968) 13

Ginzburg v. United States, 383 U. S. 453 (1966) 14, 15, 15fn, 16

Griswald v. Connecticut, 381 U. S. 479 (1965) 13fn

Jacobellis v. Ohio, 383 U. S. 184 (1963) 15, 15fn

John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts, 383 U. S. 413 (1966) 14

Maryland Penitentiary v. Hayden, 387 U. S. 294 (1967) 11

Roth v. United States, 354 U. S. 476 (1957) 15, 15fn, 16

Stanford v. Texas, 379 U. S. 47 (1965) 11

State v. Burnett, 42 N. J. 377 (1964) 9

State v. Doyle, 42 N. J. 334 (1964) 9

U. S. v. Raines, 362 U. S. 17 (1960) 13fn

United States v. Rabinowitz, 339 U. S. 56 (1950) 10

United States Constitution Cited

First Amendment 1, 16

Fourteenth Amendment 1, 16

PAGE

Statutes Cited

N.J.S. 2A:115-1 ..... 12, 12fn, 13fn

N.J.S. 2A:133-2 ..... 12, 13

Texas State Subversive Act 11

Rule Cited

New Jersey Rules of Evidence:

4 16

Other Authorities Cited

Kronhausen, Kronhause and Kronhausen, Pornography and the Law (Rev. Ed. 1964) 14

Sibler, "The Supreme Court and Obscenity: the Ginzburg Test—Restrictions of First Amendment Freedoms Through Loss of Predictability," 21 Rutgers Law Review (1966):

56 ..... 15fn

Counter-Questions Presented

1. Whether the search incidental to an arrest was reasonable?

a) Whether there was probable cause for the arrest?

b) Whether the scope of the search was unreasonable?

2. Whether the State may make criminal a commercial enterprise in which defendants disciplined and punished people with a sado-masochistic sexual aberration for profit? Whether that question may be raised in this Court when the issue was never raised in the Appellate Division?

3. Whether any of the books and material seized is obscene under any definition of obscenity permitted by the First Amendment to the United States Constitution?

4. Does the Due Process Clause of the Fourteenth Amendment require that evidence of other publications held not obscene by this Court be admitted into evidence?

Counter-Statement of Facts

About the middle of October, 1963, Detective Arthur Magnusson, Obscenity Investigations Specialist of the Essex County Sheriff's Office, received from a citizen a copy of a publication known as *Flair*. He gave it to John Kallies, Postal Obscenity Specialist for the New Jersey area and with whom Magnusson collaborated in investigating obscenity matters involving the United States mail

Since Flair Publications was indicated as located in New York City, Kallies sent the copy of *Flair* there. Kallies reported to Magnusson that *Flair* had a post office box in New York City, signed for by a James Beard. Sometime before receiving this copy of *Flair,* Magnusson had obtained a copy of another similar publication known as *La Plume,* which he described as "one of the forerunners of the sex-type clubs . . . probably one of the most active in the country". Magnusson had learned through New York postal Inspector Dolan that a photograph of Monique Von Cleef appeared in this particular edition with a code number of 174 and the following caption:

> "N.Y.C.—Exotic Miss, 30 yrs. 36-26-36. Extremely interested in rubberwear, satin, french lingerie, discipline, etc.; Anxious to experiment. Will correspond with all. Write descriptively. Photo appreciated." (Pa. 4).

Detective Magnusson testified that the investigation in this case began when Postal Inspector Kallies handed him a letter, which was intercepted by the postal authorities and was addressed to one Ted Sullivan. The letter said in part "My new telephone number is 201-484-0840. The charge for consultation is $50.00 and it is signed Superior Monique" (T. 2.64). Detective Magnusson determined from the telephone company that the telephone

was listed to one Marianna Von Cleef, 850 Lake Street, Newark, N. J. (T. 2.65). Magnusson then spoke to Miss Von Cleef while pretending to be Ted Sullivan. That conversation is set out in the trial transcript (T. 2.65 to 66; 68 to 70). The pertinent portion of that telephone conversation follows:

> Magnusson: Could you tell me what you do for the fee, you know?
>
> Von Cleef: Just an hour and a half of discipline.
>
> Magnusson: Yeh. Do you think I could get it without clothes on, just the high heels?
>
> Von Cleef: Oh, we will talk about it later.
>
> Magnusson: Heh?
>
> Von Cleef: I would want to talk to you first. (PB. 2).

The detective and other police officers arrived outside the Lake Street premises at about 1:00 o'clock. Magnusson went in alone (T. 2.71). The door was opened for him by the defendant Beard, and when the detective asked to see Monique the defendant Beard said, "come on up stairs" Miss Von Cleef entered and they went to the third floor (T. 2.72).

She told him to take off his coat and make himself comfortable. She offered him a drink and gave him a copy of *Spankers Monthly* and told him to read it (T. 2.57). When Magnusson questioned Von Cleef about the people working dowstairs she replied, "don't worry, there is nothing to worry about. You are safe as if you were in the bank of England." She told him that the people working were a plumber and an electrician and a carpenter because she was having the house redecorated. Before she left the room to get the drink, Von Cleef said, "You can read the publication it will excite you" (T. 2.76). Miss Von Cleef returned and had a 10 oz. glass with about 5 or 6 ounces of scotch in it and somewater.

She then asked the detective to tell her something about himself. He said that he needed to be discreet, but she said she needed to know something about him to help him (Tr. 2.77). After further conversation which included a discussion of flagellation, sadism and transvestism, she asked the detective about his history in flagellation. He demurred remarking that he could not say too much because he had to be discreet. The following then took place. Magnusson said,

> "Well, I explained that I hadn't had too much experience at being the servant of a professional sadist and she asked me, she said, Well, when did you first start liking to be whipped? I said—let's see—I said that I had had an experience with a girl whom I knew and I went out with and we engaged in flagellation, and she would whip me to a point where I would be sexually aroused, and then we would consummate the normal sex act, and Miss Von Cleef at this point said, Well, I won't have intercourse with you. I said, No. I realize that you're just going to whip me until I have an orgasm, and Miss Von Cleef said 'Yes'. When she asked me about it, when did it first start, I also stated that you can't find too many people who know about this or who really understand it, and she acknowledged that, 'Yes, I understand that', and she made a reference that in Europe this practice is quite common and that she thoroughly understood it." (PA. 6-7).

The discussion continued and the Detective Magnusson said that he entered some ads from the magazine La Plume but that he had only met fakes. Miss Van Cleef replied, "After this I can put you in contact with people that are not fake" (T. 2.79). Miss Van Cleef said that she was very knowledgeable in this area and had clients all over

the country. She also told the detective that she flew to a lot of people to take care of his business (T. 2.80). He responded "You must really know your business." and she replied "that she was quite experienced at this" (PA. 6). At that time she asked him if he would like to try some bondage. He declined. At the close of the conversation she told the detective "now take all your clothes off and put these on (referring to a pair of women's high heel shoes). When I come back I want to see you on that bed in a kneeling position. All your clothes off. I'm the boss" (T. 2.80 to 81).

The detective removed his tie, shirt, undershirt and shoes and socks. While the defendant was out of the room he opened a door into another room in which he observed a black object on legs with a hole in it, later identified as a torture box. As he looked out in the hall, he said he also saw Miss Von Cleef in the process of donning her costume. When she came back into the room she asked why he was not undressed, and upbraided him for taking too long. She was attired, he said, in black high-heeled shoes, net stockings and a "tight-fitting rubber apparatus which would resemble a bathing suit". Saying that he was a little nervous, he proceeded to the lavatory. On the way he observed a strap about 16 inches long on the bed (PA. 7). The rest of the police officers entered the house at this point according to the pre-arranged plan. Magnusson then arrested Von Cleef (T. 2.85).

Detective Magnusson also explained to the court just how an operation like *Flair* and *LaPlume* worked. The detective said,

> "How they worked if they buy which is referred to as a sucker list. There is a little industry that does nothing but compile names and addresses of individuals. We have found that there are various

types of lists that have been made. Some are for people who buy contraceptives. Some are compiled by people who will buy suspect magazines through the mail or other types of things along a sexual nature, and they compile these names and they will sell them to a man who operates a club like this for maybe thirty five per thousand names.

"Now what he does is put out his little brochures. Once he is established in business and he mails them to individuals this is the way the club is perpetrated and goes on and on and enlarges.

"Now, any of the individuals receiving a solicitation from this are invited to scan the publications. They are offered to put an ad in here for a price, and they are given a code number to insure that it is very discreet and confidential. Then, if they wish to reply to any of the ads in this particular publication, they must forward a letter in a plain envelope, using the code number somewhere on the envelope. They put this envelope in another envelope and seal it up, put a stamp on it, and it has to be sent to the operator of this club.

"The operator of this club then will open the original envelope, to take out the one that is marked for whatever code number is represented on it, and then he will, in turn, forward them on.

"Now, it has been our experience that, of course, and it is quite apparent, these people do read the communications and, of course, anyone who is established here, their names are actually worth as high as a dollar a piece in the industry.

"Once the operator of this gets the transmission, let's say, from an individual who answer an ad here, he will send it on to that individual, and now these

two people are in direct contact where they actually no longer need the services of this publication. But it has been our experience that these people not only contact others; they put an ad in themselves and then start to receive mail. So it just starts to keep growing and growing and growing. It's an expanding operation. It's one of the biggest things going on in this country today." (T. 2:55 to 57).

There was testimony on the part of Inspector Dolan who was assigned in New York to investigate obscenity materials going through the mails, that his office started an investigation of the *Flair* publication as early as April 1965. His investigation disclosed that Albert J. Beard as president of Flair Enterprises, had applied on November 12, 1964, for a post office box at the Murray Hill Station, describing *Flair* as a mail forwarding service magazine club. Defendant Von Cleef had obtained Box No. 158 in her name at the Lenox Hill Station in January 1965, and 850 Lake Street in Newark had been given as a forwarding address for that box in October 1965.

Flair Enterprises also made application to First National City Bank to open a checking acccount. This application recited the concern's business as "Magazine Flair". It was signed by Beard as owner. Filed with it was a power of attorney from him designating one M. B. Moore as his attorney authorized to deposit, draw and make checks with respect to the business transacted through the bank. Defendants' attorney stipulated at the trial that Monique Van Cleef, also known as Marianna Von Cleef, was Maria B. Moore and was the same person named in the power of attorney (PA. 16-17).

Detective Magnusson explained his qualifications and background as a specialist in obscenity. Magnusson had been assigned for eight years in the Special Investigation

Division for obscenity. He had considerable training in the field of pornography, with special emphasis on sexual aberrations, including those dealing with homosexuality, transvestism, voyeurism, sadism and masochism. He had participated in almost 600 obscenity investigations (PA. 10 to 11). He then explained the significance of the various types of whips, chains, restraining equipment, straight jackets and dildos that were found (T. 2.100 to 102). The detective also described the significance of the "torture box" that was found on the premises (T. 2.111). Through Detective Magnusson, the prosecution introduced into evidence all of the equipment for torture, the books, pictures and paperbacks which are alleged to be obscene, and the financial and business records of Flair; names, correspondence and business records of Flair..

Dr. Jack Chernus, a duly qualified psychiatrist, testified that the books, pamphlets and photographs seized by the State were obscene. His testimony did not refer merely to *Spanker's Monthly* but included *Buttock Fetishism, Whip and Lash* (by "Will Beatum"), *Bound and Transformed, The Autobiography of a Flea, It's Delightful, The 120 Days of Sodom* (by the Marquis DeSade), *Lady Susan's Cruel Lover, Skirted Man, Teenage Discipline, Hermaphrodite in Silks, Dominant Female,* and *Spanker's Monthly* (PA. 19). He emphasized that these items appealed to the prurient interest of the sado-mascochists as a group (T. 2.153; T. 2.168; T. 2.174).

The defense produced Dr. Frank Caprio, also a duly qualified psychiatrist. Dr. Caprio also acknowledged that some of the printed material seized was obscene (PA. 9). Dr. Caprio examined a number of letters which were seized from the premises at 850 Lake Street. He agreed that the letters were from sado-masochists and said, "You are asking me if these letters sent by sick people who are sexual masochists if I consider them obscene and lewd. See we

are not in disagreement. I am saying they are obscene, and they come from sick people" (T. 3-134). Dr. Caprio was asked this question, "If an act of flagellation takes place on a man who is a stranger, and who is nude, to the point where he achieves orgasm, for a fee, would you consider that a lewd act? A. Yes. I have to be truthful. That would be a lewd act" (T. 3.157).

Reasons the Writ Should Not Be Granted

1. The Search Was Reasonable

This warrantless search poses no novel or *important* question which should be decided by the United States Supreme Court. The general state of law would not be affected by either an affirmance or a reversal. The New Jersey courts decided only a narrow issue, that probable cause existed for Detective Magnusson to believe that a particular statute was being violated. All the Supreme Court of the United States could ascertain if certiorari is granted is whether there was in fact probable cause for Detective Magnusson to arrest the petitioner and it is clear that there, in fact, was probable cause.

A. There Was Probable Cause for the Arrest of Petitioner.

There can be little doubt from the record that Detective Magnusson had probable cause to believe that a crime punishable by more than one year imprisonment was being committed in his presence. It is uncontested that a peace officer has the authority to arrest without a warrant when he has a reasonable basis for probable cause to believe a crime punishable by imprisonment for more than one year has been committed. *Beck* v. *Ohio*, 379 U. S. 89 (1964); *State* v. *Doyle*, 42 N. J. 334 (1964); *State* v. *Burnett*, 42 N. J. 377 (1964). As the Appellate Division found,

> "The facts known to the Officer at the time of the arrest, including Miss Von Cleef's representation as to her past experiences and intentions with regard to Magnusson's treatment in our view clearly provided probable cause for believing that the defendant Von Cleef was knowingly occupying her premises for purposes of lewdness or assignation in violation of N.J.S. 2A:133-2. Additionally, these facts reasonably justify the belief that defendant was conspiring to maintain the premises for the purpose of lewdness and to commit acts of lewdness in violation of N.J.S. 2A:98-1 and 2A:115-1." (PA. 10).

A perusal of the facts as set forth in our statement of facts indicates the propriety of the Appellate Division's conclusion. It is especially important to note the additional information was provided Detective Magnusson by the conversation which he had with Miss Von Cleef after he had arrived at the Lake Street house. It is submitted from that conversation alone he would have had probable cause to believe a crime was being committed.

B. The Scope of the Search Incident to a Valid Arrest Was Not Unreasonable.

From the record it is clear that the defendant had complete control over the premises where she was arrested (T. 1.130). It is also apparent that these premises were also premises where the crime was, in fact, being committed. The whole premises were used for the commission of the crime. *United States* v. *Rabinowitz*, 339 U. S. 56 (1950) is controlling:

> "The right to search the place where the arrest is made in order to find and seize things connected with a crime as its fruits or as a means by which it was committed seems to have stemmed from the ac-

> knowledged authority to search the person, but also the long standing practice of searching for other proofs of guilt within the control of the accused found upon arrest [citation omitted]. It became accepted that the premises where the arrest was made which premises were under the control arrested and where the crime was being committed was subject to a search without warrant." (at p. 51); see also *Maryland Penitentiary* v. *Hayden*, 387 U. S. 294 (1967); for a case in which an entire house was searched and mere evidence was introduced successfully.

It is noteworthy that the papers seized were used in the operation of petitioner's criminal enterprise.

Stanford v. *Texas*, 379 U. S. 47 (1965) is not applicable to the question at hand. That case dealt with a search warrant under a Texas State Subversive Act which permitted the police to look for evidence of communist membership and business records. In a search that was by warrant, not incidental to a valid arrest, the police took everything in sight except what was specified in the warrant. These facts are clearly not applicable to the case at bar.

Petitioner also contends that since the police had ample time to secure a warrant for Petitioner's arrest, they had time to apply for a search warrant for the residence. Of course, it is settled that, whether the police could have procured a warrant is not the test. *Cooper* v. *California*, 386 U. S. 58, 62 (1967). The question remains whether the search was reasonable.

2. The Constitution Does Not Prohibit the State from Making Criminal a Commercial Enterprise in Which Petitioners Disciplined and Punished People with a Sado-Masochistic Sexual Abberation for Profit.

The constitutionality of N.J.S. 2A:115-1 was never placed in issue by the petitioners in the Appellate Division of the Superior Court of New Jersey. The argument of the petitioners to the Appellate Division was a narrow statutory one. There, they merely argued that the conduct in question was not rendered criminal by the statutes, N.J.S. 2A:115-1 and 2A:133-2. The Appellate Division of New Jersey was never afforded an opportunity to consider the constitutionality of the statute as applied.[1]

---

[1] N.J.S. 2A:115-1 states in pertinent part "Any person who . . . in private commits an act of lewdness . . . with another, *grossly scandalous and tending to debauch the morals and manners of the people,* is guilty of a misdemeanor." (Emphasis supplied.)

The petitioner argues that the Appellate Division's interpretation made criminal lewedness in the abstract a crime. However, neither the statute nor the Appellate Division has done that. The statute includes the important phrase that the lewedness must be "grossly scandalous and tend to debauch the morals and manners of the people." Private acts committed between consenting adults who may be married do not fall within the perview of this statute, as has been suggested by petitioners. For it is crystal clear from the record below that we are not here concerned with the type of situation which petitioners urge is before the Court. Petitioners have characterized the event as a simple act involving two consenting adults performed in private. Rather, the record reveals a wide system of solicitation and evidence from which it could reasonably be inferred that the lewed acts were performed on the premises for profit. The Appellate Division held that "The evidence also justifies the jury in concluding that this was not simply an isolated, erotic episode on the part of the defendant, Von Cleef, but was representative of other acts of perversion being carried on by these defendants at the premises as a part of a far-flung commercial

(*Footnote continued on following page*)

It is axiomatic that constitutional questions must have been preserved below.

Moreover, the question of lewd conduct is also covered by the violations of N.J.S. 2A:133-2 which prohibits anyone from maintaining a building for the purposes of soliciting lewdness. That statute is not under attack here. The principles enunciated by Justice Stewart in his concurring opinion in *Epton* v. *New York*, 390 U. S. 29 (1968) should be controlling here, and certiorari of this question should be denied.

(*Footnote continued from preceding page*)

enterprise (PA. 16). Moreover, this is the type of lewdness which, in fact, is grossly scandalous and tends to debauch the morals and manners of the people.

It must be noted that whatever infirmities section 115-1 might contain regarding the rights of married persons, the petitioner clearly does not have standing to assert an alleged infringement of these rights, since she is not a member of that class of persons. Furthermore, it is submitted that the petitioner has no right of sexual freedom in the privacy of her own home, and her reliance on *Griswald* v. *Connecticut*, 381 U. S. 479 (1965), is vastly misplaced. The holding of *Griswald* was narrowly drawn so as to apply only to the right of sexual privacy of *married persons*. As Justice Goldberg, in his celebrated concurring opinion, pointed out about the *Griswald* holding:

> Finally, it should be said of the Court's holding today that it in no way interferes with a State's proper regulation of sexual promiscuity."

Since the State has a legitimate interest in prescribing the perverted sexual practices such as the petitioner engaged in, N.J.S. 2A:115-1 is not an unconstitutional infringement of the petitioner's constitutional rights.

Even if it were to be conceded that the statute is overly broad, the conduct evidenced by the record in this case is so hard-core that this court should not consider the issue. *U. S.* v. *Raines*, 362 U. S. 17, 20-23 (1960); see generally *Dombroski* v. *Pfister*, 380 U. S. 479, 486-7 (1965) for a discussion of the general rule.

3. The Books and Materials Seized Were Obscene, Especially When Viewed as Part of the Far-Flung Commercial Enterprise to Exploit People Suffering from a Sado-Masochistic Sexual Aberration.

The question before this court is not whether *Spanker's Monthly* was obscene. Numerous books, pamphlets, photographs were seized and introduced into evidence. If any of those books or pamphlets is deemed to be obscene then the petitioners are not entitled to the protection of the First Amendment to prohibit the State from imposing criminal sanctions. No questions of *scienter* or intent have been raised by petitioner. The only issue is the obscenity of this material.

It is clear that most of the material involved is patently obscene under the standard of *"John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Massachusetts,* 383 U. S. 413 (1966). In fact, the *Autobiography of a Flea* is used as an example of hardcore pornography by the Doctors Kronhausen, Kronhause and Kronhausen, *Pornography and the Law* (Rev. Ed. 1964).

Even if the material is not obscene in the abstract, it is most certainly obscene when considered as part of a commercial system of exploitation of individuals with a sado-masochistic sexual aberration. Justice Brennan, in *Ginzburg* v. *United States,* 383 U. S. 453 (1966), viewed these publications "against a background of commercial exploitation of erotic solely for the sake of their prurient appeal." There he found that the record indicated that the material was sold as part of the "sordid business of pandering". It must be remembered that both the magazine "Eros" and the "Handbook on Selective Promiscuity" almost certainly would not have been held to be obscene had they been judged in the abstract. Ginzburg's experts testified to the therapeutic value of the "Handbook". The trial court in *Ginzburg* singled out only four articles in "Eros" as objec-

tionable. Nevertheless, it is clear that each of the four articles had some redeeming social value. A photo essay which dealt with interracial love was termed "outstandingly beautiful" by Professor Horst W. Janson, Chairman of the Fine Arts Department of the New York University. Dwight McDonald, an eminent critic, also praised the essay. McDonald additionally found an article by Doctors Eberhard and Phyllis Kronhausen as "an extremely interesting and important study." Another article found to be objectionable by the trial judge in the *Ginzburg* case was an excerpt from "My Life and Love" by Frank Harris, a book that Justice Douglas pointed out has been extensively reviewed in serious periodicals and has indisputably attained some statute. *Ginzburg* v. *United States, supra,* at page 488.

It seems clear from the record in *Ginzburg* that under the standard applied in *Roth* v. *United States,* 354 U. S. 476 (1957) and *Jacobellis* v. *Ohio,* 383 U. S. 184 (1963) and the *Fanny Hill* case, *supra, Ginzburg* was not even "a close case." The facts in *Ginzburg* lead to the conclusion that evidence of pandering and commercial exploitation is of the utmost importance. In this case, a review of the records, indicates the existence of a system of commercial exploitation that far exceeds that in the *Ginzburg* case. Business records of *Flair,* the large list of names, the correspondence, and Detective Magnusson's explanation of the workings of this sordid business all color in the details of a gigantic commercial business. The *Ginzburg* case appears to have adopted Chief Justice Warren's concurring opinion in *Roth.*[2] In that opinion the Chief Justice wrote:

---

[2] It has been suggested that the *Ginzburg* case, far from adding another link to the chain of the Supreme Court's definitions of obscenity, represents a radical departure from the carefully concepted Roth-Jacobellis test. Sibler, "The Supreme Court and Obscenity: the Ginzberg Test—Restrictions of First Amendment Freedoms Through Loss of Predictability," 21 Rutgers Law Review 56 (1966).

"Present laws depend largely upon the effect that the materials may have upon those who receive them. . . . It is not the book that is on trial, it is the person. The conduct of the defendant is the central issue, not the obscenity of the book or the picture." *Roth* v. *United States, supra,* at page 495. Clearly, the conduct of the petitioners in this case is not protected by the First Amendment to the Constitution of the United States.

4. The Due Process Clause of the Fourteenth Amendment Does Not Require That Evidence of Other Publications Held Not Obscene by This Court be Admitted into Evidence.

There is no constitutional requirement that a trial judge admit into evidence publications adjudged not obscene for the purpose of comparison to those in issue. *Books, Inc.* v. *United States,* 358 F. 2d 935, 939 (1st Cir. 1966), reversed *per curiam* on other grounds 388 U. S. 449 (1967). There Judge Wyzanski held that the trial judge did not abuse his discretion in so ruling. In the case *sub judice,* the trial judge relied on that case and on Rule 4 of the New Jersey Rules of Evidence which permits the judge to prohibit the admission of probative evidence if he feels that it will result in the trial of a tangential issue and unduly consume time. This is precisely what the trial judge did here. The wisdom of his ruling becomes all the more apparent when the rationale of the *Ginzburg* case is recalled. If it is not the book that is on trial but rather the person, then the rulings concerning other books that are available and have been held to be not obscene lessen in probative value. Moreover, while the material in question may have been similar to *Spanker's Monthly,* it is not similar to the other material which was before the jury, another factor which diminishes the probative value. The ruling is evidentiary, and, it is submitted, a proper one. But even if the ruling were to be improper, such an error is hardly of Constitutional dimension.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should not be granted.

Respectfully submitted,

JOSEPH P. LORDI,
County Prosecutor of
Essex County,
Attorney for Respondent,

By: ALAN SILBER,
Assistant Prosecutor,
PAUL MURPHY,
Assistant Prosecutor.

VON CLEEF ET AL. *v.* NEW JERSEY.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY.

No. 837. Decided June 23, 1969.

Petitioner Von Cleef was arrested on the third floor of a 16-room house in which she lived. Police, without a search warrant, then searched the entire house and seized several thousand articles, many of which were introduced at trial. The New Jersey courts concluded that the search and seizures were constitutionally permissible as incident to a valid arrest. *Held:* It is not necessary to decide whether *Chimel* v. *California*, *ante*, p. 752, applies retroactively, as the scope of the search and seizures here was "beyond the sanction of any" previous decision, *Kremen* v. *United States*, 353 U. S. 346, 347.

Certiorari granted; 102 N. J. Super. 102, 245 A. 2d 495, reversed and remanded.

Herald Price Fahringer for petitioners.

Paul Murphy for respondent.

PER CURIAM.

The petitioners were convicted in a New Jersey trial court of conspiring to maintain a building for purposes of lewdness and to commit acts of lewdness, N. J. Rev. Stat. §§ 2A:98–1, 2A:133–2, 2A:115–1; permitting a building to be used for purposes of lewdness, N. J. Rev. Stat. § 2A:133–2 (b); and possessing with intent to utter obscene publications, N. J. Rev. Stat. § 2A:115–2. Their convictions were affirmed by the Superior Court, Appellate Division, 102 N. J. Super. 102, 245 A. 2d 495, and the Supreme Court of New Jersey denied review, 52 N. J. 499, 246 A. 2d 456. The petitioners make several arguments, but their principal contention is that evidence introduced at their trial was secured in violation of the Fourth and Fourteenth Amendments.

Petitioner Von Cleef was arrested on the third floor of a 16-room house in which she and petitioner Beard lived. Although no search warrant had been issued, several policemen proceeded to search the entire house for a period of about three hours. They eventually seized several thousand articles, including books, magazines, catalogues, mailing lists, private correspondence (both opened and unopened), photographs, drawings, and film. The petitioners' motion to suppress was denied, and "a considerable number" of the items seized were introduced into evidence by the prosecution and "commented upon by several witnesses during the trial." 102 N. J. Super., at 109, 245 A. 2d, at 499.

The petitioners attack the New Jersey courts' conclusion that the search and seizures described above were constitutionally permissible as being incident to a valid arrest. This challenge would unquestionably be well founded if today's decision in *Chimel* v. *California, ante,* p. 752, were given retroactive application. But we need not decide here whether *Chimel* should be applied retroactively. For even under the constitutional standards prevailing before *Chimel,* see *United States* v. *Rabinowitz,* 339 U. S. 56; *Harris* v. *United States,* 331 U. S. 145, the search and seizures involved here were constitutionally invalid.

New Jersey relies primarily on *United States* v. *Rabinowitz, supra,* in which this Court upheld the search of a one-room business office and the seizure of 573 stamps with forged overprints. But the Court's opinion in *Rabinowitz* specifically referred to the factors that were thought to make the search in that case reasonable:

> "(1) the search and seizure were incident to a valid arrest; (2) the place of the search was a business room to which the public, including the officers, was invited; (3) the room was small and under the immediate and complete control of respondent;

(4) the search did not extend beyond the room used for unlawful purposes; (5) the possession of the forged and altered stamps was a crime, just as it is a crime to possess burglars' tools, lottery tickets or counterfeit money." 339 U. S., at 64.

Although the arrest of petitioner Von Cleef may for our purposes be assumed to have been lawful (the petitioners argue that it was not), the factual circumstances here are otherwise quite different from those of *Rabinowitz*. Even the facts of *Harris* v. *United States*, *supra*—in which the search of a four-room apartment and the seizure of an envelope containing altered Selective Service documents were sustained on the ground that they were contemporaneous with a lawful arrest—are a far cry from those of this case. While *Rabinowitz* made the principles governing searches accompanying arrests unfortunately hazy, see *Chimel* v. *California*, *supra*, at 766, we have no hesitation in concluding that the action of the police here in combing a three-story, 16-room house from top to bottom and carting away several thousand papers, publications, and other items cannot under any view of the Fourth Amendment be justified as "incident to arrest." Like the search and "mass seizure" in *Kremen* v. *United States*, 353 U. S. 346, see *Abel* v. *United States*, 362 U. S. 217, 239, such action is simply "beyond the sanction of any of our cases." 353 U. S., at 347.

Accordingly, the petition for writ of certiorari is granted, the judgment below is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK and MR. JUSTICE WHITE concur in granting certiorari but dissent from reversal of the judgment and remand of the case without a hearing.

MR. JUSTICE HARLAN, concurring in the result.

Unfortunately, I remain unconvinced that the search in this case may be properly distinguished from the search tolerated by the Court in *Harris* v. *United States*, 331 U. S. 145 (1947). Nor do I believe that our decision in *Kremen* v. *United States*, 353 U. S. 346 (1957) proscribes this search. *Kremen* simply prohibits the police from seizing the entire contents of a building indiscriminately, without considering whether the property they take is relevant to the crime under investigation; it does not bar the removal of all property that may reasonably be considered evidence of crime. The Appellate Division of the New Jersey Superior Court properly found that the police in the case before us did not engage in the practice condemned in *Kremen:* "[T]he search was extensive, but under the circumstances it was reasonable . . . *the items searched for and seized related to the criminal operation for which the arrest had been made.*" (Emphasis supplied.) Surely, there is no reason to condemn a search as resulting in a "mass seizure" simply because it uncovers abundant evidence of wrongdoing. And yet, that is what the Court does today in relying on *Kremen* to decide this case.

Consequently, I am obliged to reach the question whether the stricter Fourth Amendment standards announced today in *Chimel* v. *California, ante*, p. 752, govern this case; for in my view, it is only if *Chimel* is applicable that we may legitimately reverse the judgment of the New Jersey courts. Since I have reached the conclusion that all cases still subject to direct review by this Court should be governed by any "new" rule of constitutional law announced in our decisions, see my dissent in *Desist* v. *United States*, 394 U. S. 244, 256 (1969), I join in the Court's judgment.